

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 167

SIDNEY J. UNGAR, APPELLANT,

vs.

HONORABLE JOSEPH A. SARAFITE, JUDGE, ETC.

APPEAL FROM THE COURT OF APPEALS OF THE
STATE OF NEW YORK

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**IN THE COURT OF APPEALS
OF THE STATE OF NEW YORK**

**In the Matter of the Application of
SIDNEY J. UNGAR, Petitioner-Appellant,
against**

Honorable JOSEPH A. SARAFITE, Judge of the Court of General Sessions of the County of New York, Respondent-Respondent,

to review a determination and order of the respondent adjudging petitioner guilty of a criminal contempt of court.

STATEMENT UNDER RULE 234

This is a special proceeding to review a determination of respondent-respondent adjudging petitioner-appellant guilty of a criminal contempt of court.

The proceeding was commenced by service of the Petition with Notice upon respondent-respondent on April 12, 1961. Respondent-respondent's answer was served on June 1, 1961. Petitioner-appellant's Reply was served on March 21, 1962.

[fol. 2] The proceeding was brought in the Appellate Division, First Judicial Department, of the Supreme Court of the State of New York.

The full names of the original parties are as above set forth. There has been no change of parties herein.

The attorney for the petitioner-appellant is Eve M. Preminger, 711 Fifth Avenue, New York 22, N. Y. William G. Mulligan, Esq., argued the proceeding in the Appellate Division.

The attorney for the respondent-respondent is Hon. Frank S. Hogan, District Attorney, New York County, 155 Leonard Street, New York, N. Y.

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[fol. 3]

IN THE SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—FIRST JUDICIAL DEPARTMENT
No. 4630

In the Matter of the Application of
SIDNEY J. UNGAR, Petitioner,
against

Honorable JOSEPH A. SARAFITE, Judge of the Court of General Sessions of the County of New York, Respondent,
to review a determination and order of the respondent adjudging petitioner guilty of a criminal contempt of court.

NOTICE OF APPEAL—May 31, 1962

Sirs:

Please take notice that the petitioner above-named hereby appeals as of right to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court, First Judicial Department, entered in the office of the Clerk of said Appellate Division on April 3, 1962, which unanimously affirmed a determination, mandate of order and judgment of conviction of the respondent, [fol. 4] Honorable Joseph A. Sarafite, Judge of the Court of General Sessions of the County of New York, entered on December 13, 1956, adjudging petitioner guilty of criminal contempt of court and sentencing him to a fine of \$250.00 and to imprisonment for ten days in the civil jail of the County of New York, and petitioner appeals from each and every part of the said order as well as from the whole thereof.

This appeal is taken pursuant to Subdivision 1 of Section 588 of the Civil Practice Act upon the ground that there is directly involved herein the question of the construction of the provisions of the Sixth and Fourteenth Amendments

to the Constitution of the United States and Article I, Section 6, of the Constitution of the State of New York.

Dated, New York, New York, May 31, 1962.

Yours, etc.,

William G. Mulligan, Attorney for Petitioner-Appellant, 36 West 44th Street, New York 36, New York.

To: Honorable Frank S. Hogan, District Attorney, New York County, 155 Leonard Street, New York 13, New York; Clerk of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department.

[fol. 5]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—FIRST JUDICIAL DEPARTMENT

ORDER APPEALED FROM—April 3, 1962

Present—Hon. Benjamin J. Rabin, Justice Presiding, Hon. Francis L. Valente; Hon. James B. M. McNally, Hon. Samuel W. Eager, Hon. Aron Steuer, Justices.

In the Matter of the Application of

SIDNEY J. UNGAR, Petitioner,

vs.

Honorable JOSEPH A. SARAFITE, Judge of the Court of General Sessions of the County of New York, Respondent, to review a determination and order of the respondent adjudging petitioner guilty of a criminal contempt of court.

The above-named petitioner, having moved this Court, pursuant to Article 78 of the Civil Practice Act, for a review by the Court of a determination, Mandate of Order and [fol. 6] Judgment of Conviction of the respondent, Honorable Joseph A. Sarafite, Judge of the Court of General

Sessions of the County of New York, entered on December 13, 1960; adjudging petitioner guilty of criminal contempt of the Court and sentencing him to a fine of \$250 and to imprisonment for ten days in the Civil Jail of the County of New York, and for an order annulling and vacating said Mandate of Order and Judgment of Conviction.

And said proceeding having duly come on to be heard before this Court and having been argued by Mr. William G. Mulligan of counsel for the petitioner, and by Mr. H. Richard Uviller of counsel for the respondent, and due deliberation having been had thereon,

It is unanimously ordered that the determination Mandate of Order and judgment be and the same hereby are affirmed with costs to the respondent.

Enter:

Vincent Massi, Clerk.

[fol. 7]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

NOTICE—April 12, 1961

Sir:

Please take notice that upon the annexed petition of Sidney J. Ungar duly verified April 12, 1961 the undersigned will move this Court pursuant to Article 78 of the Civil Practice Act on a motion day to be held in and for the First Judicial Department at the Court House, 25th Street and Madison Avenue, in the Borough of Manhattan, City of New York, on the 25th day of April, 1961 at 1:00 o'clock P.M. or as soon thereafter as counsel can be heard, for an order granting a review of the Mandate of Order and Judgment of Conviction made and entered by the Honorable Joseph A. Sarafite, a Judge of the Court of General Sessions of the County of New York, dated December 13, 1960, wherein he adjudged petitioner guilty of criminal contempt of court and sentenced him to a fine of \$250.00 and to

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imprisonment for ten days in the civil jail of the County of New York, and for a final order annulling and vacating said Mandate of Order and Judgment of Conviction, and for such other and further relief as may be just and proper.

Please take further notice that pursuant to Section 1291 of the Civil Practice Act you are required to serve at least [fol. 8] two days prior to the return day a verified answer annexing thereto the certified transcript of the record of the proceedings subject to this review and any affidavits or other written proof to be used herein.

Dated: New York, New York, April 12, 1961.

Yours, etc.,

William G. Mulligan, Attorney for Petitioner.

To: Hon. Joseph A. Sarafite, Judge of the Court of General Sessions of the County of New York, Respondent.

[fol. 9]

IN THE SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—FIRST DEPARTMENT

In the Matter of the Application of

SIDNEY J. UNGAR, Petitioner,

against

Honorable JOSEPH A. SARAFITE, Judge of the Court of General Sessions of the County of New York, Respondent,

to review a determination and order of the respondent adjudging petitioner guilty of a criminal contempt of court.

PETITION—April 12, 1961

To the Honorable Presiding Justice and Associate Justices
of the Appellate Division of the Supreme Court of the
State of New York, First Judicial Department:

The petition of Sidney J. Ungar, respectfully shows and alleges:

1. This petition pursuant to Article 78 of the Civil Practice Act is made to obtain relief from a Mandate of Order made and entered by the respondent on December 13, 1960 (a copy of which is annexed hereto and marked Exhibit 1) wherein he adjudged petitioner guilty of criminal contempt of court and sentenced him to a fine of \$250.00 and to imprisonment for ten days in the civil jail of the County of New York.

[fol. 10] 2. The said Mandate of Order made by the respondent should be annulled and vacated on the grounds that none of the acts of petitioner on which the same is based constituted a criminal contempt of court; petitioner did not wilfully commit any contempt but acted in good faith as a witness under oath attempting to discharge his obligation to tell the whole truth; the respondent did not act in good faith or in a judicial manner in his conduct toward petitioner, but on the contrary continually made unjudicial and unreasonable rulings and addressed remarks to petitioner which provoked incidents chargeable as contempts; the respondent did not maintain an impartial attitude as between petitioner and the prosecutor and defense counsel in the trial at which the alleged contempts occurred or take the steps incumbent upon a judge presiding at a criminal trial to protect a witness from unfair tactics of counsel, but instead supported the prosecutor's efforts to curtail petitioner's testimony, distort the true facts, and discredit petitioner although he had been called as a prosecution witness; petitioner never intended to publicly make the charge of suppression of evidence against respondent, and his outburst resulted from emotional strain caused by the unjudicial and grossly unfair conduct of the respondent; the respondent denied petitioner a fair hearing upon said Mandate of Order, including a reasonable adjournment to prepare a defense, the right to representation by counsel, and an opportunity to show by medical and other evidence that any contumacious behavior was not committed wilfully; and on the further ground that the said Mandate of

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[fol. 11] Order is void and defective in that it does not comply with the requirements of §§ 750, 751 and 752 of the Judiciary Law, which require the particular circumstances of the offense of contempt to be set forth in the mandate of commitment, whereas said Mandate of Order is ambiguous and does not clearly set forth the precise offense alleged, in that it recites a number of occurrences which are not alleged to be contemptuous and then states that petitioner is adjudged guilty of criminal contempt, he

"having committed the acts hereinabove recited, and having shouted at the Court, 'I am being coerced and intimidated. The Court is suppressing the evidence,' while said court was in session, and in the immediate view, hearing and presence of the jury, by conduct which was wilfully contemptuous and insolent, and in a manner directly tending to interrupt the proceedings of the Court and to impair the authority due to it"

The said statements in the Mandate of Order do not constitute a complete, true, fair, or accurate specification or setting forth of acts constituting a criminal contempt of court.

3. As the respondent well knew, the outburst quoted in the Mandate of Order took place after petitioner, while on the witness stand for the third full day in the second trial of Hulan E. Jack in a criminal case, had stated respectfully to the respondent:

"If your Honor please, I want a recess at this point. I [fol. 12] can't testify. I am too upset, and I am much too nervous. And I can't testify under these circumstances. I am not being a voluntary witness. I am being pressured and coerced and intimidated into testifying, and I can't testify under these circumstances."

Moreover, the condition of mind and emotions indicated by the above statement had been brought about by a process of repeated bully-ragging of petitioner by the respondent and by Alfred J. Scotti, Esq., the Chief Assistant District Attorney prosecuting said Hulan E. Jack, which respondent and said Scotti perpetrated almost continuously throughout petitioner's testimony. For examples from the

stenographic record of these bullying tactics and of petitioner's patient forbearance and respectful demeanor thereunder up to the very moment of the said outburst, petitioner incorporates by reference herein the contents of Exhibit 2 hereto (Proceedings of the second Jack trial on November 23, 1960) and Exhibit 3 hereto (Proceedings of the second Jack trial on November 23, 1960).

4. It was after the events recorded in Exhibits 2 and 3 hereto that, respondent and said Scotti having continued their hazing of petitioner, on November 25, 1960 petitioner made the further respectful statement to respondent, and respondent made the comments attributed to him in the following colloquy:

"The Witness: I can't testify, your Honor. I am shaking all over. And I must have a recess, I just am absolutely [fol. 13] a bundle of nerves at this point, and I don't know what I am doing or saying any more.

"I ask for the privilege of leaving the stand, your Honor.

"The Court: No, you will remain on the stand.

"The Witness: I can't testify, I'm sorry, your Honor. I am not in any physical or mental condition to testify.

"The Court: Mr. Witness, no one asked you anything. Nobody is questioning you. You are not testifying. We have taken a recess for about three minutes of silence, and we will take a few more minutes.

"The Witness: I would like to leave the stand, your Honor.

"The Court: No, you may not leave the stand."

(The foregoing is quoted from Exhibit 4 hereto, an excerpt from the Proceedings of the second Jack trial on November 25, 1960.)

5. It was not until after all of the foregoing had occurred, that the proceedings on which the Mandate of Order is predicated took place, and as recorded by the Court Stenographer they were (Exhibit 4 hereto, pp. 6-8):

"The Court: Proceed, Mr. Scotti.

"The Witness: I am not going to testify in this confusion, and the Court nor anyone else will make me testify in this

emotional state. I am absolutely unfit to testify because of your Honor's attitude and conduct towards me. I am being coerced and intimidated and badgered. The Court is suppressing the evidence.

[fol. 14] "The Court: You are not only contemptuous but disorderly and insolent.

"The Witness: I have asked for the privilege of leaving the stand for five minutes.

"The Court: Put your question, Mr. Scotti.

"Mr. Baker: May I renew my motion?

"The Court: The motion is denied.

"Mr. Baker: Exception.

"Q. Mr. Ungar, did you tell Mr. Jack that Saturday morning that there was a conflict between your story to me and Mr. Bechtel's story to me?

"A. I can't answer any questions. I am not even concentrating on what you are saying. I can't even think clearly at this minute any more.

"The Court: Do you refuse to answer?

"The Witness: I don't know what he is talking about, Judge. I am an emotional wreck this time. I am asking for a recess. I ask the right to get off this stand so that I can contain myself.

"The Court: Do you refuse to answer the question, Mr. Ungar?

"The Witness: I said I can't answer the question, your Honor.

"The Court: Put the question, Mr. Reporter:

"Mr. Scotti: Mr. Reporter, read the question.

"(The question was read by the Court Stenographer as follows:

"Q. Mr. Ungar, did you tell Mr. Jack that Saturday morning that there was a conflict between your story to me and Mr. Bechtel's story to me?")

[fol. 15] "The Court: Let the record show that the defendant has remained silent and has not answered the question for four minutes.

"Mr. Scotti: You mean the witness, your Honor.

"The Court: What did I say?

"Mr. Scotti: The defendant.

"The Court: Obviously I meant the witness. Very well, we will advance our luncheon recess."

6. The Mandate of Order should be annulled and vacated on the ground that the acts recited in the Mandate of Order, even if contemptuous, were not wilfully so, but rather were the good-faith effort of a witness under oath to tell the whole truth rather than partial truths sought to be elicited by the prosecutor.

7. The two criminal trials of Hulan E. Jack, who at the time was President of the Borough of Manhattan, arose out of an indictment voted by the Grand Jury of New York County on January 12, 1960. This indictment contained four counts:

The first count charged that Mr. Jack had conspired with petitioner "and others" to obstruct justice and the due administration of the New York City Charter by concealing the fact that petitioner had made payments to one Fred Bechtel for work done on Mr. Jack's apartment between February 4, 1958 and May 13, 1958, and by making it appear that Mrs. Almira Jack was the person who had paid for the said work.

The second and third counts of the indictment charged [fol. 16] violations by Mr. Jack alone of the provisions of the New York City Charter relating to conflicts of interest by an officer of the City who accepts gifts, loans or things of value from a person interested in the performance of a contract or in the acquisition of property for which the consideration is payable from the City treasury:

the second count pertained to the leasing of office space by the City in a building at 299 Broadway, New York, New York.

the third count pertained to petitioner's intention (which was never realized) to acquire through a corporate vehicle property which the City of New York allegedly would (but actually did not) condemn for the Riverside-Amsterdam Project, a Title I Slum Clearance project.

The fourth count of the indictment charged Mr. Jack with violating a Charter provision forbidding a City officer to accept "gratuities" from a person whose interests might be affected by that officer's official actions; and charged that petitioner paid for the work on Mr. Jack's apartment in order to give him "gratuities" to affect Mr. Jack's action as a member of the Board of Estimate in relation to the Riverside-Amsterdam Project.

8. This Court in April, 1960, and the New York Court of Appeals in May, 1960, overruled motions addressed to the indictment and sustained the sufficiency of Counts 2, 3 and [fol. 17] 8 N. Y. 2d 857). Upon information and belief the question whether the first (conspiracy) count charged a crime was not discussed, considered or decided by such Courts; as alleged in Paragraph 52 of this petition the acts alleged in said first count, if committed, did not constitute a crime.

9. Following the said ruling of the Court of Appeals, there ensued two separate trials of Hulan E. Jack, at each of which petitioner was called as a prosecution witness and interrogated at very great length. The first trial resulted in a disagreement of the jury. The second trial resulted in an acquittal of Mr. Jack upon the fourth count of the indictment (charging that petitioner had paid him gratuities to influence his action as a member of the Board of Estimate) and convicting Mr. Jack on the first three counts of the indictment. Petitioner is informed and believes that an appeal from the said conviction is being prosecuted.

10. On the basis of facts known to petitioner, it is petitioner's belief and opinion that Hulan E. Jack is absolutely innocent of each and every of the crimes charged against him, including those of which he was found guilty at the second Jack trial. Petitioner believes that in truth and in fact evidence available to the District Attorney of New York County, which would have created a reasonable doubt as to Mr. Jack's guilt or innocence, was deliberately and willfully suppressed, as will appear more fully hereinafter. One of the grounds of petitioner's conviction for criminal

contempt is petitioner's statement to the foregoing effect [fol. 18] during a moment of great emotional stress and physical and mental exhaustion at the second trial of Hulan E. Jack on November 25, 1960. To demonstrate Mr. Jack's innocence of the charges against him and reveal the evidence which the District Attorney suppressed, it is necessary to plead herein the relationships of the parties—not only between petitioner and Mr. Jack, but also between petitioner and the District Attorney—and to present these relationships in the context of the documentary and other evidence relating to guilt or innocence.

Relationships Between the Parties

11. Petitioner was born September 11, 1914; he was graduated from City College of the City of New York with the degree of Bachelor of Social Sciences; and *cum laude* from Brooklyn Law School, where he was Associate Editor of the Brooklyn Law Review. He was admitted to the New York Bar in 1935. He was married June 30, 1940 and of this marriage has three children, a daughter Joan, aged 19, now attending New York University; a son John, aged 15, attending Stuyvesant High School; and a daughter Roberta, aged 9, attending the Lycee Francaise.

12. In addition to engaging in the practice of law, petitioner became active in the real estate field, especially in the syndicating and developing of large real estate projects.

13. At one time prior to 1946 petitioner was active in New York City politics, running in the congressional primary in 1942 as an insurgent against Martin J. Kennedy, [fol. 19] who was nominated and elected. In connection with his political activities petitioner met Hulan E. Jack in 1940 as Mr. Jack was elected to his first term in the New York State Assembly. Petitioner and Mr. Jack, who was about nine years petitioner's senior in age, took to each other immediately and became close friends. Petitioner attended Mr. Jack's wedding early in 1941 to his present wife, Mrs. Almira Jack, in Montclair, New Jersey. In 1942 petitioner transferred his political activities to Mr. Jack's district at his suggestion, and petitioner was designated as

Deputy to the District Leader in charge of the First to Tenth Election Districts on the east side of the 17th Assembly District (now known as the 14th Assembly District), Manhattan. In 1944 petitioner and Mr. Jack went together to the Democratic National Convention in Chicago, Mr. Jack as a delegate, and since then petitioner and Mr. Jack together attended almost every national and state convention until 1958, sharing the same suite of rooms and each paying his share of the hotel bills.

14. Following the death of Mr. Jack's District Leader, James Pemberton, in 1946, petitioner led an unsuccessful movement to make Mr. Jack the leader; thereafter petitioner ceased activities in politics except for attending conventions and dinners with Mr. Jack. Petitioner's friendship with Mr. Jack continued and he and Mr. Jack and their families saw each other regularly socially and vacationed together. Petitioner was associate Campaign Manager for Mr. Jack in his first campaign for election as Borough President and was active in his subsequent campaign to succeed himself in that office.

[fol. 20] 15. After Mr. Jack was elected Borough President of Manhattan in 1953 petitioner began to urge him to move to more attractive living quarters in keeping with the dignity and prominence of his new position. Petitioner and his family were frequently in the Jack residence and Mr. Jack and his family were often in petitioner's, since the families were entertained by each other for dinner and otherwise hundreds of times.

16. Mr. Jack in the conduct of his office as Borough President was to petitioner's personal knowledge always most circumspect and, particularly when any interest of petitioner's was concerned, Mr. Jack went out of his way to maintain an aloof and conspicuously correct attitude. Nevertheless, petitioner's intimate friendship with Mr. Jack was a matter of common knowledge to almost every city official and political leader; so that when petitioner desired to see a city official on any matter of official business, and Mr. Jack telephoned such official to request an interview, no explanation was ever required. The fact was that petitioner

never discussed with Mr. Jack the purpose of his visits with Abraham B. Beame, the Budget Director, James Felt, the City Planning Commissioner, Charles H. Tenney, the Corporation Counsel, or any other city official. Upon information and belief, in 1956 Mr. Jack spoke to Robert Moses about the Riverside-Amsterdam Project, hereinafter mentioned. This was some two years before the work was done on Mr. Jack's apartment. Work done on the Jack apartment in 1958 bore no relation whatever to said conversation in 1956 between Mr. Jack and Mr. Moses, or to any other [fol. 21] matter affecting the City's property, funds or business.

17. During the several years previous to November, 1957, petitioner had, though also engaged in the practice of law, been spending most of his time in real estate matters, owning, managing and syndicating various properties, and had prospered financially. Petitioner had become acquainted with various contractors who did work on properties which petitioner owned or managed or participated in owning or managing.

Renovation of the Jack Apartment

18. In November, 1957, shortly after Mr. Jack's reelection as Borough President of Manhattan, the question of moving or fixing his apartment was raised again and since Mr. Jack refused to move out of the Assembly District of which he was Leader, because of his feelings towards his constituents, he agreed to repair, redecorate, and refurnish his apartment. Petitioner thereupon negotiated a five-year lease of the apartment with Mr. Jack's landlord and arranged for a decorator and a contractor to submit estimates. The decorator was Mrs. Victoria Kenedy. The contractor, Fred Bechtel, had done work on properties which petitioner owned or managed.

19. The estimates for refurnishing and redecoration totalled about \$16,000.00 of which about \$12,000.00 was for new furnishing and the balance was for the repair and redecorating work. Mr. Jack said that he could not afford to

spend much money but that he could undertake to pay between \$10,000.00 and \$12,000.00.

[fol. 22] 20. The foregoing discussions continued until near the end of the calendar year 1957, at which time petitioner offered to arrange with said Fred Bechtel to do the repair and redecorating of Mr. Jack's apartment upon the understanding with Mr. Jack that petitioner would advance the payments to said Bechtel in the first instance and that Mr. Jack would reimburse petitioner when he was able to do so and after he would have paid off certain loans which he had made.

21. Early in 1958 petitioner arranged with said Bechtel for the performance of the work on Mr. Jack's apartment and between February 4, 1958 and May 13, 1958 petitioner made payments therefor to the said Bechtel totalling about \$4,000.00. The last payment to said Bechtel was made not later than May 13, 1958.

22. During the period from late November 1957 to May 13, 1958, and for additional time before the beginning and after the end of said period, petitioner was not a person interested directly or indirectly in the performance of a contract, the expense, price or consideration of which was payable from the Treasury of The City of New York and was not a person interested directly or indirectly in the acquisition of property, the expense, price or consideration of which was payable from the Treasury of The City of New York, or in the purchase of real property belonging to or taken by The City of New York.

The Building at 299 Broadway
New York City

23. The company which owned the building at 299 Broadway had leased space to The City of New York, but the [fol. 23] lease came to an end and the City became a statutory hold-over tenant.

24. Early in September 1957 the owner or the said building offered it for sale to petitioner but petitioner indicated willingness to purchase only if either the City or another

responsible tenant was obligated under a satisfactory long-term lease.

25. During September 1957 petitioner made inquiries at the City's Bureau of Real Estate and was informed of the terms on which the City would enter into a new lease for said space. At no time did petitioner or anyone on his behalf inform Mr. Jack or consult him concerning these inquiries.

26. Thereafter petitioner negotiated a contract to buy said building through Garep Realty Corp., a corporation controlled by petitioner, the purchase to be made upon condition that the seller obtain from the City a new lease on the terms outlined to petitioner as alleged in Paragraph 25.

27. As soon as the contract of sale had been made the owner of the building (the seller) opened negotiations with the city Bureau of Real Estate and during September and early October 1957 arrived at proposed terms for a lease, which the Bureau of Real Estate then submitted to the Budget Director as required by law.

28. Early in October 1957 the Budget Director recommended a reduction in the term of the lease from ten years to six years and four months. This reduction in term was [fol. 24] agreed upon and a letter, modifying and amending the contract of sale, was duly executed between the seller and Garep Realty Corp.

29. As appears from Exhibit 5 hereto (a summary and excerpts of the minutes of the meeting of the Board of Estimate held October 24, 1957), the final action by the Board of Estimate was taken on October 24, 1957. Acting upon the recommendation of the Budget Director, the Director of Real Estate, and a Committee of the Board of Estimate of which committee Mr. Jack was not a member, that a lease for this period and on the terms presented would be advantageous to and in the best interest of the City, the Board of Estimate unanimously approved the terms of lease.

30. Thereafter on December 9 and 10, 1957 said lease was formally executed between the City and the owner

of 299 Broadway. On January 20, 1958 the Duane Broad Corp., following several mesne assignments from said Garep Realty Corp., took title to the building.

31. Thus after October 24, 1957 there was no action taken or to be taken by Mr. Jack or upon which he could vote as Borough President of Manhattan with reference to the City's lease of space at 299 Broadway; and during the entire period of petitioner's arrangements with and payments to said Bechtel there was nothing affecting that subject matter pending before the Borough President of Manhattan or the Board of Estimate of which he was a member.

32. Petitioner is informed and believes that prior to the rulings by respondent in the trials of Hulan E. Jack in [fol. 25] 1960 no court, legislature, or rule-making body in the State of New York had ever determined that a conflict of interest could exist on the part of a state or municipal officer with the interest of another person in a governmental contract over which the said public official had no control and concerning which he had no vote; and that the Attorney General of the State of New York had maintained the policy since 1912 that a conflict of interest could not arise on the part of a public official having no power at the time to control or influence the making or performance of the contract with the person in question.

The Riverside-Amsterdam Project

33. Late in 1955 petitioner personally originated the concept of "Spot Clearance" for clearing a slum area—that is, the concept that in place of razing and then rebuilding an entire area, there should be razed and replaced only those structures which are incapable of rehabilitation, while the remainder are either used as they stand or are rehabilitated, where necessary, at substantial savings to the public.

34. In 1956 and at all later times herein mentioned there existed the Mayor's Committee on Slum Clearance, composed of six members appointed and removable by the Mayor of The City of New York and consisting of: Robert Moses, City Construction Coordinator, Chairman; Thomas

J. Shanahan, Vice-Chairman of the New York City Housing Authority, Vice-Chairman; James Felt, Chairman of the City Planning Commission; Percy Gale, Jr., Director of [fol. 26] Real Estate, Board of Estimate; Bernard J. Gillroy, Commissioner of Buildings; and Robert G. McCullough, Chief Engineer, Board of Estimate. The said Committee had jurisdiction, among other things, to approve projects for the clearance of slum areas pursuant to Title I of the Federal Housing Act of 1954, and to designate tentative sponsors for such projects, subject to ultimate approval of the Board of Estimate and the City Planning Commission.

35. Early in 1956 petitioner presented the "Spot Clearance" concept to William S. Lebwohl, Director of the Committee mentioned in Paragraph 34 hereof, herein called the "Slum Clearance Committee". Petitioner proposed the application of this concept to a project, which was denominated the Riverside-Amsterdam Project, for the clearance of a slum area consisting of West 83rd to West 86th Streets between Amsterdam Avenue and Riverside Drive. Thereafter (also in early 1956) petitioner at Mr. Lebwohl's suggestion presented the concept to Mayor Robert F. Wagner, who stated that he approved the idea but pointed out that this should be presented to Mr. Jack since it was a Borough of Manhattan project. Petitioner then exhibited his plans to Mr. Jack.

36. Mr. Jack called a meeting in his office of some 20 to 25 persons representing various city departments; the "Spot Clearance" concept was presented and it was the sense of all those present that it should be approved with enthusiasm. Mr. Jack thereupon authorized petitioner to inform the Slum Clearance Committee that Mr. Jack approved the [fol. 27] "Spot Clearance" concept for the project described in Paragraph 35 of this petition. Following that Mr. Jack spoke to Mr. Moses as alleged in Paragraph 16 of this petition.

37. Upon information and belief, other than eventually tabling the Project altogether, the only action the Board of Estimate ever took on the Riverside-Amsterdam Project was to apply to the Federal Housing and Home Finance

Agency for, and to accept, so-called "study funds" for use in considering the Project; the application was approved in or about July, 1956 and the funds were accepted in or about January, 1958 (Mr. Jack being absent from the latter meeting). At the earlier of these dates neither petitioner or his group had been designated even tentatively as sponsors of this Project. Upon information and belief no other action on the said Project was ever taken by any governmental unit of The City of New York of which Mr. Jack was a member.

38. Upon information and belief: All other actions relating to the Riverside-Amsterdam Project, while petitioner had any direct or indirect connection with it, including the designation of petitioner's group, incorporated as the Riverside-Amsterdam Operating Corp., as a tentative sponsor in October and November, 1956, were taken by the Slum Clearance Committee except for actions to table the Project as hereinafter alleged. Thereafter all Title I projects in New York City (including the Riverside-Amsterdam Project) were suspended in July, 1957 by reason of a dispute between Commissioner Robert Moses and Albert M. Cole, Administrator of the Federal Housing and [fol. 28] Home Finance Agency, and the Slum Clearance Committee did not deal with sponsorship of the Project again until July, 1958. Neither in 1958, while petitioner was advancing the funds for the alterations on the Jack apartment, nor at any other time, did Mr. Jack (nor was he asked to) speak to anyone connected with the Slum Clearance Committee in an effort to influence it to redesignate petitioner's group as sponsor, even though at the very time said funds were being advanced petitioner's group was in jeopardy of losing its tentative sponsorship to other prospective sponsors. In April, 1959 the Board of Estimate tabled the Project upon motion of Mr. Jack, and in November of the same year referred it back to the City Planning Commission, in effect terminating the Project. At no time whatever was there any contract between petitioner or his group and The City of New York with reference to this Project. All the foregoing facts were known

to the District Attorney before the first Jack trial. The District Attorney also knew the period of time during which the sponsorship by petitioner's group was in abeyance while other prospective sponsors were being considered, and that the Slum Clearance Committee did not redesignate petitioner's group until July, 1958.

39. Petitioner is informed and believes that prior to the rulings by respondent in the trials of Hulan E. Jack in 1960 no court, legislature, or rule-making body in the State of New York had ever determined that a conflict of interest could exist on the part of a state or municipal officer with the interest of another person in a governmental contract [fol. 29] over which the said public official had no control and concerning which he had no vote and upon which he did not at any time have occasion to vote; and that the Attorney General of the State of New York had maintained the policy since 1912 that a conflict of interest could not arise on the part of a public official having no power at the time to control or influence the making or performance of the contract with the person in question.

Generally as to "Conflict of Interest" on the
Part of Hulan E. Jack toward Business
Interests of Petitioners

40. Upon information and belief, at no time mentioned in this petition did there exist, nor has there ever existed, any conflict of interest on the part of Hulan E. Jack toward any business interest of petitioner; every act in his capacity as Borough President was performed by Mr. Jack in the public view and without corrupt motive; and no such act by Mr. Jack tended to introduce the influence of possible adverse interest into the performance of his official acts; but on the contrary all of these were dictated solely by considerations of the public welfare.

The Background of the Jack Indictment.

41. The Riverside Amsterdam Project was on the February 13, 1959 calendar of the Board of Estimate for public hearings and for action on a preliminary plan submitted by

the Slum Clearance Committee when, on February 12, 1959, a reporter for the *New York Post* notified petitioner that he was seeking information about petitioner as a realty operator [fol. 30] for the purpose of determining whether in his opinion petitioner was a fit person to sponsor the said Project. The *New York Post* was at the time engaged in a crusade against the regular Democratic political organization in New York County and the reporter stated that petitioner was close to said leadership and close to Mr. Jack-- which petitioner did not deny. Petitioner conferred with the said reporter on February 13, at which time it was divulged that the *New York Post* contemplated publishing a derogatory news article concerning petitioner's connection with multiple dwellings which said reporter alleged had been allowed to fall into a condition of disrepair and neglect. Notwithstanding that petitioner placed said reporter in possession of facts refuting the proposed derogatory news article, on February 19, 1959, the *New York Post* published a headline and article containing false and defamatory references to petitioner. Said article and subsequent publications in the *New York Post* are the subjects of actions for defamation of character which petitioner has instituted against said *New York Post* and others and which are presently pending undetermined in the Supreme Court of the State of New York, County of New York.

42. Following several adjournments of the calendar item for the Riverside Amsterdam Project by the Board of Estimate, as a result of said publications in the *New York Post* and agitation consequent thereon, the Board of Estimate on April 9, 1959 determined to take no action upon the said Project and postponed it indefinitely.

43. As a further result of said publications in the *New York Post*, the Department of Buildings and the Corporation Counsel of The City of New York instituted criminal proceedings against petitioner charging him with permitting violations of the Multiple Dwelling Law to exist in a structure under his direct or indirect control. The said criminal proceedings came on to be heard in June 1959 at a Court of Special Sessions upon which respondent herein

sat as one of the Bench. Following a trial the full Bench, including respondent, unanimously voted to dismiss the criminal proceedings and they were dismissed.

44. At all times herein mentioned Alfred J. Scotti was and is Chief Assistant District Attorney of New York County.

45. Immediately after the publication of the first article in the *New York Post* mentioned in paragraph 41 of this petition in February 1959, petitioner communicated in writing to Frank S. Hogan, Esquire, District Attorney of New York County, requesting that action be taken against said *New York Post* for its criminal libel of petitioner. Upon information and belief Mr. Hogan referred petitioner's communication to the said Scotti; the said Scotti asked petitioner to submit his proofs to him. A few weeks later petitioner began to call the said Scotti for an appointment to submit evidence of the criminal libel but was unsuccessful in his efforts to set up an appointment with him. In April 1959, petitioner met with said Scotti at the Democratic County Dinner, and Scotti urged petitioner to withhold the request for criminal prosecution until petitioner had determined whether to institute a civil action for libel; he also mentioned the pendency of the criminal proceedings against [fol. 32] petitioner described in paragraph 43 of this petition, and suggested deferring action against the *New York Post* until a time after the disposition of said proceedings.

46. In June and July 1959 after the criminal proceedings against petitioner had been dismissed, the said *New York Post* again published defamatory material about petitioner, following which petitioner instituted the first of his actions for defamation of character as above stated. Petitioner again wrote to Messrs. Hogan and Scotti and again requested prosecution of the *New York Post* for its criminal libels, but petitioner was again put off. Upon information and belief, immediately after petitioner's said civil action was instituted against the *New York Post*, it commenced an intensive investigation in an effort to destroy petitioner's standing, reputation, and good name in the community in the course of which its reporters were in communication with

Fred Bechtel, the person mentioned in Paragraphs 18, 20, and 21 of this petition. Unknown to petitioner said Bechtel was harboring a grievance against petitioner and against Mrs. Jack based on said Bechtel's belief that he was entitled to several hundred dollars more than he had been paid for his work on the Jack apartment, mentioned in Paragraphs 20 and 21 of this petition.

47. On December 9th, 1959, the *New York Post* threatened to print an article based on an interview with said Bechtel to the effect that petitioner had paid for the remodeling of the Jack apartment, and the *Post* claimed that petitioner had illegally charged the cost thereof as an expense of real [fol. 33] estate owned by petitioner personally, a claim which was absolutely untrue, petitioner having paid for the Jack alteration with his personal funds. Mr. Jack refused to comment, and petitioner denied the charges to the said newspaper's reporter.

48. In view of the threat of publication of the news article mentioned in Paragraph 47 and on December 9, 1959, petitioner and his wife met Mr. Jack at the residence of petitioner's brother at which time Mr. Jack stated in substance that if he admitted that petitioner had paid for the work on his apartment he would be embarrassed before the public and his political career would be ruined. No thought was given by petitioner to possible criminal proceedings based on petitioner's payments for work on Mr. Jack's apartment; and, on information and belief, Mr. Jack had no thought of criminal proceedings at that time. At such meeting Mr. Jack was in a state of high excitement and panic, as was petitioner's wife, both of whom feared publicity of any sort. There was no intention to obstruct justice and no thought that what they might do would obstruct justice, since they had no thought (and petitioner does not now believe) that any crime has been committed. After much discussion in an atmosphere of great excitement, it was eventually suggested that the version of events to be given to the press be that Mrs. Jack had saved the money to pay to the said Bechtel from her household accounts, and that there be a denial that petitioner had advanced the funds.

49. On the following day petitioner interviewed Bechtel, who stated that he would issue a number of false receipts [fol. 34] to Mrs. Jack which in total would represent the moneys paid to him by petitioner, on condition that the said Bechtel should receive \$1,100.00 which he claimed as "extras" in connection with the work on the Jack apartment. Petitioner paid said Bechtel two hundred dollars in cash on account and said Bechtel agreed that a mutual friend of his and petitioner's would hold the receipts in escrow pending the payment to Bechtel of the balance claimed for said "extras".

50. Upon information and belief, the following morning representatives of the *New York Post* communicated with the said Scotti, as a result of which the said Scotti issued and caused to be served upon Bechtel a subpoena; and said Bechtel in response to the subpoena had an interview with said Scotti on or about December 11, 1959. Earlier on the same day petitioner telephoned said Scotti and arranged to call upon him at the office of the New York County District Attorney to make a complaint against the *New York Post* for an attempt to entrap petitioner through a violation of the New York wiretapping statute.

51. In his first interview with said Scotti on or about December 11, 1959 petitioner accused Scotti of covering up for the *New York Post* on its criminal libel of petitioner and stated that petitioner desired to press the wiretapping and criminal libel charges. The said Scotti then told petitioner to take these charges to the Magistrates' Court. Petitioner asked Scotti why he had not told the *New York Post* to do the same. Said Scotti retorted that petitioner could not tell [fol. 35] him how to conduct his office, and demanded petitioner's explanation for the Bechtel story. To avoid having the *New York Post* learn the true facts and not being under oath or under grand jury subpoena or under any other sanction of law to disclose the true facts, petitioner informed Scotti that petitioner had not advanced the funds to Bechtel and that the said Scotti should ask Mr. Jack who had paid Bechtel.

52. To the best of petitioner's knowledge and belief, at this time no court had ever decided that it is an obstruction of justice to tell untruths to the New York County District Attorney at an informal interview in his office; and although the New York Legislature had amended the only applicable section of the Penal Law, Section 580, at the legislative sessions of 1957 and 1959, it had not made any amendment of that section to reword the statute so as to make it so provide. In view of Mr. Jack's state of panic at the possible revelation that petitioner had provided the funds for the work on his apartment, and in view of the said Scotti's actions consistent with the interest of the *New York Post*, petitioner did not consider it improper to conceal petitioner's role in providing the said funds.

Petitioner's attitude toward Mr. Scotti and what was to be revealed to or concealed from him, did not apply to testimony before the grand jury—and petitioner so made clear at the time to Mr. Jack, the said Bechtel, and all others concerned.

53. On, or about December 12, 1959 petitioner saw Mr. Jack and found Mr. Jack to be in a state of emotional [fol. 36] upset bordering on hysteria, professing the belief that his career was ruined. As the conversation continued Mr. Jack was wringing his hands, shaking from side to side and pleading with petitioner for help. Petitioner informed Mr. Jack that the matter had turned into a grand jury investigation and that petitioner wanted nothing more to do with it. Mr. Jack was in tears and petitioner likewise commenced to sob and run out of the house.

54. Thereafter both Mr. Jack and petitioner were taken before the New York County grand jury. Upon information and belief Mr. Jack told the complete truth to the grand jury. Petitioner answered all questions truthfully and supplied all the facts during his own grand jury testimony. Petitioner was examined by the said Scotti on approximately ten occasions before the New York County grand jury in 1959 and 1960. Before being called as a witness at the first Jack trial petitioner was not permitted to read any part of his own grand jury testimony nor has he ever been given access to it.

The First Jack Trial

55. As the date for commencing the first trial of Hulan E. Jack approached petitioner made every effort to ensure that his own belief in Mr. Jack's innocence and the outspoken hostility between himself and the said Scotti personally should not lead to any untoward incidents at the trial. The said Scotti knew from facts in his possession that petitioner had not engaged in any conspiracy to obstruct justice and had had no personal motive to serve [fol. 37] either in assisting Mr. Jack in the renovation of his apartment or in trying to help a friend in distress by going along with a plan to protect him from ruinous publicity.

56. On June 10, 1960, Mr. Lacter of the New York County District Attorney's office conferred with petitioner and discussed petitioner's position as a witness; he informed petitioner on June 11 that in a two hour conference he had with the said Scotti thereafter they had agreed that petitioner was not to be examined as or considered a hostile witness. After that the press carried the story on the 15th and 16th that the District Attorney expected petitioner to be hostile. Petitioner went to see the said Scotti on the morning of the 20th and he confirmed that petitioner would not be examined as a hostile witness. Yet when petitioner was called as a witness in the first Jack trial on June 20, 1960, the said Scotti proceeded, after the first group of questions on the Title I matter, to treat petitioner as a hostile witness and for 3½ days continually cross-examined him.

57. Upon information and belief never before the first Jack trial was it contended in either a civil or a criminal case in the State of New York that acts of the nature therein to be presented could constitute a violation of the civil law, let alone a crime. Upon information and belief before the rulings mentioned in paragraph 8 of this petition it had been the opinion of scholars and experts in municipal law that the acts charged in the indictment did not constitute any crime. Upon information and belief the District Attorney of New York County and the grand jury had been

[fol. 38] induced by the said Scotti to take the official position that a hitherto unknown crime had been committed by Mr. Jack, a person holding the highest office to which any Negro had ever been elected in the United States of America. Upon information and belief this placed the District Attorney of New York County in an embarrassing predicament and the said Scotti determined that he could best extricate the District Attorney's office from its untenable official position by casting petitioner as leading villain in a fantasy entitled The Whodunit Nobody Done which was about to be unfolded at the first Jack trial.

58. During the said first trial the said Scotti continually held press conferences during petitioner's testimony at the said first trial and gave out false and misleading information about petitioner designed to prejudice the jury and the public against Mr. Jack and petitioner.

59. With the prosecution's first witness, Fred Bechtel, the said Scotti deliberately offered irrelevant information inferring that petitioner had falsified the documents for the work done on the Jack apartment so that the payments could be deducted by petitioner as a personal business expense, when the said Scotti knew that this was untrue.

(a) Several times before the grand jury petitioner had presented proof to clearly establish that the moneys spent for the Jack apartment were petitioner's own personal funds, as they were.

(b) The office of the District Attorney conducted a three month investigation of petitioner's books and records [fol. 39] ords following the indictment. The prosecutors' accounting staff was satisfied that petitioner had actually advanced his own personal funds for the work at the Jack apartment.

(c) Before petitioner testified on the first day of the first Jack trial, he asked the said Scotti to clear up this error as a matter of fair play, by permitting petitioner to testify as to the full and true facts. The said Scotti refused to do so, and deliberately withheld information from the trial jury which he, as Chief Assistant District Attorney, had an

obligation to produce, particularly since it was he who had created the erroneous impression.

60. The said Scotti repeatedly confronted petitioner with grand jury testimony which did not contradict petitioner's trial testimony but which he so used at the trial as to create the impression of contradiction. He deliberately attempted to create the impression that petitioner's participation in the matters at issue, especially in the alleged conspiracy, had been actuated by evil motives when he knew there was no evidence that petitioner had any motive other than the innocent one of helping Mr. Jack. The said Scotti continued the investigation of petitioner long after the indictment in the hope of finding a personal motive for petitioner's participation in the alleged conspiracy and he could find none.

61. Upon information and belief, respondent and said Scotti were associated together on the staff of the New [fol. 40] York County District Attorney and respondent was said Scotti's immediate superior for 17 years before respondent left said office to become City Treasurer in 1957 and then in the same year ascended the bench; and said Scotti succeeded respondent as Chief Assistant District Attorney of New York County.

62. At the said first Jack trial respondent in substantially all instances supported with judicial rulings the positions of the said Scotti toward petitioner, however unfair the same might be, and in particular reinforced from the bench the insistence of the said Scotti that petitioner give answers which were misleading or half truths and that petitioner could not be given an opportunity to explain such answers.

63. Notwithstanding the hostile attitude toward petitioner of the said Scotti and the reinforcement of his attitude by respondent in substantially all instances, petitioner was successful in testifying to enough of the truth so that the first trial resulted in a jury disagreement as to whether the defendant Hulan E. Jack was guilty on any of the counts in the indictment. Upon information and belief,

the jurors were evenly divided upon the question of guilt before the Court discharged them.

Events Between the End of the First Jack Trial and the Beginning of the Second Jack Trial

64. Following the disagreement of the jury in the first Jack trial petitioner registered with the Presiding Justice of this Court a written protest against the predetermined [fol. 41] plan of the said Scotti to destroy petitioner publicly and to present a warped, distorted, and half-true version of the facts. Petitioner reviewed his efforts to have respondent protect petitioner or let him protect himself and to permit petitioner to give full and complete answers to questions put to petitioner in the course of his testimony; and petitioner requested that in the event of a retrial of the Jack case petitioner be ensured courteous and correct treatment as a witness and the opportunity to tell the full truth.

65. Immediately before the start of the second Jack trial petitioner tried without success to obtain an opportunity to read his own grand jury testimony and his own testimony at the first Jack trial in the interest of giving accurate testimony and in the hope of avoiding conflicts with the said Scotti and respondent. Petitioner then appealed to respondent himself to make petitioner the Court's witness and pleaded the unfairness of being treated by the prosecutor as a hostile witness, being disowned by the defense so that facts not disclosed upon direct examination were also not elicited upon cross-examination, and being reviled and held up to public ridicule by both prosecutor and defense counsel without any protection from the Court.

66. When the foregoing appeal to respondent was ignored petitioner even went to the length of preparing a motion addressed to respondent seeking the protection of the Court against improper, unfair, collateral, or irrelevant questioning by either the said Scotti or defense counsel and praying that petitioner be deemed to be a witness called by the Court. When presented to him just before petitioner [fol. 42] was called as a witness at the second Jack trial the respondent brushed said motion aside as a nullity, refused to consider it at all, and ordered defense counsel to sup-

press its contents and permit no person to know that the motion existed.

The Second Jack Trial

67. Respondent presided at both the first and second Jack trials. The same prosecutor, the said Scotti, acted for the District Attorney at both trials. Defense counsel, Carson DeWitt Baker, Esq., acted as such at both trials. All the principals at the second Jack trial were fully familiar with petitioner's treatment at the first trial, with his struggle to testify to the full truth thereat, and with those portions of his testimony which were deemed undesirable for the purposes of the said principals in accomplishing their ends, however true said testimony might be.

68. Upon information and belief, the said Scotti arrived at a predetermined plan, in advance of the second Jack trial, for preventing petitioner from testifying to those facts (some of which had come out in the first trial) which were not deemed helpful to the prosecution's case against Mr. Jack. One effect of the said plan and of the support given to it by rulings of respondent at the second Jack trial appears in the facts that at the first trial petitioner's testimony covered more than 875 pages while at the second trial it occupied less than 475 pages of the stenographic minutes.

69. At the second Jack trial petitioner was first called as a witness on the afternoon of November 22, 1960. Petitioner testified responsively and without incident for approximately 50 printed pages of minutes and managed to avoid any clash with the said Scotti, who was examining him, until an occasion arose when Mr. Scotti attempted to make it appear, contrary to the known facts, that it was petitioner who had negotiated the new lease with The City of New York for the owners of the building at 299 Broadway. The moment petitioner answered that he could not accept the said Scotti's formulation, respondent interposed immediately:

"It is not a question of whether you can accept it, it is a question of whether you can answer it."

70. Petitioner then succeeded in testifying without incident for approximately 40 further printed pages of minutes before getting into an altercation with the said Scotti over the meaning of a stock transaction between petitioner and the companies which took title to the building at 299 Broadway. Petitioner testified that his interest in Duane-Broad Corporation was a stated number of shares of no-par stock; Mr. Scotti and respondent both insisted that petitioner state his stock ownership "in dollars"—an obvious misunderstanding of fact on the part of the said Scotti and respondent. When petitioner stated:

"I would like to explain the matter which I think could simplify it very quickly",

respondent replied:

"No, no, no, Mr. Ungar. Please don't volunteer statements like that.

[fol. 44] "As I indicated to you before, we have lawyers who conduct litigation. They have a right to phrase questions. It is not for you to volunteer anything. If you want to explain, or if the question is not satisfactory to you, that's none of your business.

"Now, please, keep that in mind, will you."

71. Notwithstanding the foregoing facts respondent at the end of the second Jack trial signed an order to show cause (Exhibit 6 to this petition) in which respondent stated in part:

"It was evident to the Court from the very beginning of the respondent's testimony that he had embarked upon a course of conduct designed to obstruct the orderly proceedings of the court."

The foregoing statement was and is false in fact and indicates the bias of respondent against petitioner and that this bias obtained from the very beginning of the second Jack trial and throughout the lengthy proceedings thereat before any clash with the said Scotti or respondent took place.

72. In the second Jack trial the said Scotti resorted, as he had in the first trial, to a number of artifices for giving

a misleading or distorted version of the facts. By way of illustration, he made it a practice with the support of rulings by respondent to frame a question which impliedly asserted an untruth, and then to ask petitioner "Do you deny that?", insisting upon a yes or no answer. Respondent repeatedly ordered petitioner to answer such a question yes or no.

[fol. 45] 73. In the second Jack trial petitioner was again a victim, as he had been in the first trial, of outrageous and utterly unwarranted characterizations, permitted or supported by rulings of respondent, at the hands of the said Scotti. In questions to the Mayor of the City, for example, the said Scotti suggested that reports described petitioner "as a very bad man, completely unsuitable for the role of sponsor", repeating this characterization despite the refusal of the witness to confirm or support it.

74. At the second Jack trial there were differences between the said Scotti and petitioner as to numerous matters of fact involving the said Scotti as a participant or to which the said Scotti personally was an eye-witness—including incidents between the said Scotti and petitioner in the said Scotti's office before the Jack indictment, and including the meaning and interpretation of questions asked and answers given before the grand jury and during the first Jack trial. The said Scotti repeatedly gave what amounted to his personal version of these disputed matters by framing leading questions to petitioner. After a time, defense counsel objected to the said Scotti leading and cross-examining his own witness, petitioner. Thereupon respondent declared petitioner to be a hostile witness, although the prosecutor did not request it; indeed, respondent in the course of a colloquy with defense counsel stated to defense counsel:

"Since you asked for it, I am now ruling that he [petitioner] is a hostile witness."

The above statement by respondent was false in fact, for defense counsel had not asked for any such ruling and [fol. 46] the same was a gratuitous act by respondent which strengthened the hand of the said Scotti in curtailing peti-

tioner's testimony on the second Jack trial and in enabling the said Scotti to use his official position as prosecutor in placing his version of such events before the jury.

75. Respondent in the course of the second Jack trial on November 23, 1960 inadvertently, perhaps, spread upon the record the attitude which respondent had in fact entertained toward petitioner from a time antedating the start of the said second trial, when, ordering petitioner into the robing room and reading directly from § 750 of the Judiciary Law, respondent said to petitioner:

"A number of incidents occurred in that [first] trial which, in my judgment, directly tended 'to interrupt the proceedings of the Court and to impair the respect due to the authority' of the Court, and you were the one who created those incidents, in my judgment."

On the same occasion in the robing room petitioner protested that in order to answer a question he as a witness had to understand it; respondent retorted "Don't argue with me, Mr. Ungar."

76. On a later occasion, also on November 23, 1960, the said Scotti insisted that petitioner testify to the meaning of some initials placed at the end of a copy of a letter typed in petitioner's office. In his customary style, the said Scotti asked:

[fol. 47] "Do you deny those letters mean that the stenographer took dictation from you?"

and when petitioner answered "I don't know", the following occurred:

"The Court: Yes, you are directed to answer it.

"The Witness: I can't answer the question, your Honor.

"The Court: Strike it out.

"To the Witness: Answer the question.

"The Witness: I can't answer it. I don't know.

"The Court: Now, Mr. Witness, I am going to direct you not to give the same answer again.

"Do you understand my direction?

"The Witness: I do, your Honor.

"The Court: Repeat the question, Mr. Reporter."

It was immediately after this extraordinary ruling, in which the court insisted that "I don't know" is not an answer to a question of fact in a courtroom, that respondent gratuitously and on his own motion ruled petitioner to be a hostile witness. In an effort to avoid what petitioner considered to be a sinister plan by respondent and the said Scotti working in concert, to entrap petitioner into an occasion of contempt, petitioner on November 23, 1960 and on Thanksgiving Day November 24, 1960 consulted two distinguished members of the Bar, Moses Kove, Esq., a former Assistant United States Attorney and Sol Gelb, Esq., a former Assistant District Attorney of New York County; and petitioner also on November 24 consulted a [fol. 48] physician and obtained special pills to calm his nervous state, which petitioner took as prescribed on November 25.

77. After the occurrence on November 25, 1960 which appears in Exhibit 4 to this petition, and during the luncheon recess, petitioner went to Beekman-Downtown Hospital and received an injection to further calm his nerves. Respondent had thrice refused to order a medical examination into petitioner's condition, yet accused petitioner publicly of "malingering." After receiving the injection, nevertheless, petitioner was able to complete his examination, cross-examination, and redirect examination on the afternoon of November 25 and on November 28, 1960 without any special incident. It is noteworthy, however, that, even though petitioner was now calm and defenseless under the tranquillizing influence of the injection and other medications, the said Scotti twice taunted petitioner with the prospective risk of his disbarment. The colloquies connected therewith are set forth in Exhibit 7 to this petition.

The Contempt Citation

78. Upon information and belief, respondent planned during the second Jack trial to commit petitioner for contempt and the only open question was when respondent would see fit to inaugurate proceedings to do so. Upon information and belief, on the afternoon of December 2,

1960, before the conclusion of the second Jack trial, respondent requested the said Scotti to have his staff commence preparation of an order to show cause for the purpose of [fol. 49] holding petitioner in contempt; and work under the supervision and direction of the said Scotti proceeded in that respect over a period of six days, from December 2 to December 8, 1960.

79. On the morning of December 8, 1960 an assistant to the said Scotti telephoned petitioner's office to say that respondent wished to serve an order to show cause, which would soon be ready, and wanted to know petitioner's whereabouts. Upon being told that petitioner was out of town that morning, the said Scotti's representative replied, "I don't care where he is, out of town; why, we will serve the paper on him. Just tell me where he is." Petitioner returned to New York City that afternoon especially to receive service of the said order to show cause (Exhibit 6 to this petition) and it was served upon him by two detectives attached to the said Scotti's office at about 4:30 on the afternoon of that day.

80. Although the said Scotti's staff at the behest of respondent had devoted six days to preparing the order to show cause, respondent directed that it be made returnable less than three business days later; it was dated Thursday, December 8, 1960 and was returnable at 10:00 A.M. on Tuesday, December 13. On the week-end of Saturday-Sunday, December 10-11, some seventeen inches of snow fell in the City of New York and traffic on Monday, December 12, was at a standstill. Nevertheless, when petitioner appeared with counsel on the morning of December 13 respondent arbitrarily refused counsel a one-week adjournment to finish a case in which he was presently engaged in [fol. 50] the Supreme Court of the State of New York, New York County. Respondent's excuse for this arbitrary action, which rendered it necessary for petitioner's counsel to withdraw from the matter, was that "This man [petitioner] has had three weeks' notice of this proceeding. He took the stand in the second trial on November 22nd, and from the very outset conducted himself in a manner simi-

lar to his conduct in the first trial . . . and . . . certainly was aware of the fact that the Court was referring to contemptuous conduct." The foregoing statement, if intended to refer to notice of the contents of the order to show cause—the only relevant subject of such comment—was false on its face, and respondent well knew that petitioner did not receive any copy of the order to show cause until late in the afternoon of December 8, less than five days earlier.

81. When the time came in 1961 to proceed with an appeal from the ensuing Mandate of Order of contempt, respondent required more than three weeks to examine and pass upon a partial printed record of the proceedings enumerated in his own order to show cause, as to which he deemed that less than five days was sufficient time in which petitioner could prepare to defend himself against grave charges of criminal contempt, for which petitioner was to be sent to jail. The difference was that in the one case respondent's conduct as a judge was in prospect of being reviewed by the appellate courts, while in the other what was at stake was the liberty of petitioner, a member of the Bar in good standing who had never before been convicted of any crime.

[fol. 51] 82. Without permitting petitioner any opportunity to seek or obtain substitute counsel, without affording petitioner himself any opportunity to present evidence—including hospital records of the Beekman-Downtown Hospital or expert medical testimony as to petitioner's physical and emotional condition on November 25, 1960—or any opportunity to show that petitioner had acted in good faith and had not wilfully committed any contempt, respondent summarily pronounced petitioner guilty on December 13, 1960 and imposed a fine of \$250.00 and in addition committed petitioner to imprisonment for ten days in the civil jail of the County of New York. The proceedings at the so-called hearing of December 13, 1960 are annexed hereto as Exhibit 8 to this petition.

83. Thereafter the fine was paid under protest and petitioner served the jail sentence, having been denied a

stay of respondent's order by Honorable Charles D. Breitel, one of the Justices of this Court, and having sued out a writ of habeas corpus which was dismissed at New York County Special Term.

Procedure for Review

84. On December 30, 1960 petitioner duly appealed to this Court from the Mandate of Order and the judgment of conviction; on January 11, 1961 petitioner served and filed an amended notice of appeal to this Court. Petitioner is informed by counsel and believes that the correct remedy to review the Mandate of Order herein is by appeal, inasmuch as this was not a summary contempt proceeding. [fol. 52] Nevertheless, petitioner is advised by counsel that it is necessary to file the within petition in order to protect petitioner's rights to review in event this Court or the New York Court of Appeals should determine as a matter of law that the alleged contempt was punished summarily and is therefore reviewable only under Article 78 of the Civil Practice Act. Petitioner does not intend by the filing of the foregoing petition to make an election of remedies but believes on the contrary that, since the alleged contempt was punished after a hearing upon exhibits and evidence, it is reviewable by appeal.

WHEREFORE petitioner prays that this Court make an order either annulling and vacating the Mandate of Order and the judgment adjudging petitioner guilty of criminal contempt herein and dismissing the order to show cause herein or, in the alternative, setting the subject matter of this petition and of any return thereto for hearing and determination.

Sidney J. Ungar, Petitioner.

William G. Mulligan, Attorney for Petitioner.

[fol. 53] *Duly sworn to by Sidney J. Ungar, jurat omitted in printing.*

[fol. 54]

EXHIBIT 1 TO PETITION**MANDATE OF ORDER ADJUDGING WITNESS
GUILTY OF CONTEMPT**

At a Term of the Court of General Sessions held in,
and for the County of New York at the Court
House in the County of New York, State of New
York, Part VI, November 1960 Term continued,
on the 13th day of December, 1960.

Present—Honorable JOSEPH A. SARAFITE, Judge.

—
In the Matter
of

THE CRIMINAL CONTEMPT

of

SIDNEY J. UNGAR,

Respondent.

SIDNEY J. UNGAR, having been duly cited and served in a written specification by this Court on December 8, 1960, to show cause why he should not be punished for a criminal contempt of court, committed on November 25, 1960, and proceedings thereon having been held on December 18, 1960 before this Court in Part II Courtroom of the Court of General Sessions, and said Sidney J. Ungar having been afforded the opportunity to make answer, defense, explanation, justification or excuse;

[fol. 55] And upon reading said order to show cause dated December 8, 1960, together with the exhibits put in evidence, on the proceedings herein, comprising correspondence by said Sidney J. Ungar with the Court, Court Exhibit #1, the testimony of said Sidney J. Ungar given in the first trial of *People v. Hulan E. Jack* in Part VIII, Court of General Sessions on June 20, June 21, June 22, June 23, June 24, and June 27, 1960, deemed Court Exhibit #2, the testimony of said Sidney J. Ungar given in the second trial of *People v. Hulan E. Jack* in Part VI, Court of General Ses-

sions on November 22, November 23, and November 25, 1960, deemed Court Exhibit #3, and upon the proceedings had upon the said hearing before me on December 13, 1960, in which the respondent participated, and upon all the proceedings had herein;

And it appearing to the satisfaction of this Court, from its own knowledge and observation, that throughout the said second trial the respondent intentionally and defiantly disregarded the repeated rulings and instructions of the Court as appears in Court Exhibit 3, deemed marked in evidence in this proceeding, the testimony of said Sidney J. Ungar given in the second trial of *People v. Hulan Jack* on pages 332-334, 394-398, 399-401A, 403-404, 418, 435-436, 436-441, 441-444, 460-461, 467, 469-477, 481-485, and 490-491;

And it appearing to the satisfaction of this Court from its own knowledge and observation that the respondent on occasions raised his voice and addressed the Court in a loud and contemptuous tone, as appears on pages 476, 623, 624 of the respondent's second trial testimony, Court Exhibit #3, deemed marked in evidence;

[fol. 56] And it appearing to the satisfaction of this Court, from its own knowledge and observation, that the statement made by Sidney J. Ungar to the Court, page 627, Court Exhibit #3, deemed marked in evidence, as follows, "I am being coerced and intimidated. The Court is suppressing the evidence," in open court on November 25, 1960, was the culmination of a course of conduct deliberately and wilfully chosen by said respondent, with an intent to defy the dignity and authority of the Court, which conduct had a tendency to create disorder in the courtroom and which directly interrupted the orderly proceedings of the Court, and which tended to impair the respect due to the authority of the Court, and it further appearing to the Court's knowledge and observation that the respondent's statement, "I am being coerced and intimidated. The Court is suppressing the evidence," was uttered by him in a loud, disorderly and contemptuous tone, was made with a studied insolence, at a time when the respondent's answers were responsive and was made with an intent to disregard the

repeated rulings and instructions of the Court, and that the respondent by this statement attempted to give the jury, public, and the press who were present in the courtroom the false impression that the respondent, as a witness, was being unfairly and unjustly treated by the Court,

Now, therefore, it is upon due deliberation,

ORDERED and ADJUDGED, that Sidney J. Ungar be and hereby is found guilty of criminal contempt of court committed on November 25, 1960, during the November 1960 [fol. 57] Term continued, he having committed the acts hereinabove recited, and having shouted at the Court, "I am being coerced and intimidated. The Court is suppressing the evidence," while said Court was in session, and in the immediate view, hearing and presence of the jury, by conduct which was wilfully contemptuous and insolent, and in a manner directly tending to interrupt the proceedings of the Court and to impair the authority due to it and it is therefore

ORDERED and ADJUDGED that the said Sidney J. Ungar for the said criminal contempt of court whereof he is convicted, forthwith pay a fine of two hundred fifty (\$250) dollars to the Clerk of the Court of General Sessions and that in default of the payment of said sum as a fine, he the said Sidney J. Ungar be committed to the Civil Jail in the County of New York for thirty (30) days, and in addition he is hereby directed to be imprisoned for a period of ten (10) days in the Civil Jail of the County of New York.

Now, therefore, this is to command you, the Sheriff of the County of New York, to receive the said Sidney J. Ungar into your custody and detain him in the Civil Jail in the County of New York until the judgment of this Court is satisfied.

Enter,

JOSEPH A. SARAFITE
Judge, Court of General Sessions

[fol. 58]

**COURT OF GENERAL SESSIONS
OF THE COUNTY OF NEW YORK**

Dec. 13, 1960

I CERTIFY that the annexed is a copy of Mandate of Order now on file in the Clerk's Office, and that the same has been compared by me with the original and is a correct transcript therefrom, and of the whole of said original.

WILLIAM DUZZIN,
Clerk of Court.

[SEAL]

[fol. 59]

EXHIBIT 2 TO PETITION

**EXCERPT FROM PROCEEDINGS OF NOVEMBER 23,
1960 IN TRIAL OF HULAN E. JACK**

Q. And do you recall, Mr. Ungar, both Mr. Bechtel and Mrs. Kenedy making a survey of the apartment for the purpose of determining what changes had to be made?

A. I think so.

Q. Mr. Ungar, on that occasion do you recall telling Mr. Bechtel to send to you an estimate of the cost of the remodeling job?

A. Probably. I don't have any independent recollection of it.

Q. Well, don't you recall, in essence, a discussion concerning the estimate of the work that was to be done?

The Witness: Do I recall the estimate?

Mr. Scotti: A discussion in evidence concerning the work, the estimate.

A. I don't remember, no.

Q. Well, you knew he had to give you an estimate.

A. Yes, but I don't remember the discussion you asked about.

Q. All right. Did you tell him, in plain language, Mr. Ungar, to mail the estimate of the cost of the work to you?

A. I might have.

Q. Well, you did in fact receive it, didn't you?

A. I did.

Q. And in accordance with this direction to Mr. Bechtel to mail this estimate to you or, rather, in connection with this direction, did you instruct Mr. Bechtel not to reveal the fact that the repairs were being done at Mr. Jack's apartment and to substitute, in the estimate, the premises 55 East 110 Street?

A. I did not.

Q. You deny that?

A. I do.

Q. I show you People's Exhibit 1 in evidence. You received the original of that; am I correct, sir?

A. I have it.

[fol. 60] Q. And will you be good enough to look at that again, please, and tell the Court and jury whether that copy of the original estimate refers to the work that was to be done in Mr. Jack's apartment.

A. It does.

Q. And do you notice, Mr. Ungar, the address "55 East 110th Street" in this exhibit?

A. I do.

Q. Known as People's Exhibit 1 in evidence.

A. I do.

Q. Doesn't that refresh your memory that Mr. Bechtel conformed with your specific instruction, when he inserted "55 East 110th Street"?

A. It doesn't.

Mr. Baker: I object to it as to form.

The Court: Overruled.

Mr. Baker: Exception.

A. It does not.

Q. It does not. Do you know how "55 East 110th Street" appears in this?

A. I know what Bechtel told me.

Q. You deny that Mr. Bechtel was told by you to put this address in People's Exhibit 1 in evidence?

A. I do.

Q. You do. Now, Mr. Ungar, I am going to put this question to you very directly. Isn't it a fact that you had an understanding with Mr. Bechtel to conceal the fact that these repairs were being done at Mr. Jack's apartment?

Mr. Baker: Objected to.

The Court: Overruled.

Mr. Baker: Exception.

A. I did not.

Q. You deny that? You deny having such an understanding with Mr. Bechtel?

A. I do.

[fol. 61] Q. Now Mr. Ungar, you recall my questioning you about this very matter at the last trial?

A. I do.

Mr. Scotti: Page 654, Mr. Baker.

Q. You recall my confronting you at the last trial with your grand jury testimony.

A. No.

Q. Very well. This may refresh your memory—

Mr. Scotti: Page 654, Mr. Baker.

Q. (Continuing)—Do you recall my putting to you this question: "Did you ever have a discussion with Bechtel about the necessity or desirability of keeping the fact that repairs were being made in Hulan Jack's apartment quiet or concealed? A. I believe I might have said to Bechtel that if it became a matter of public information, that I was paying for this, that it would be embarrassing to him, yes. I mean I can't answer the exact language that I might have used, but that's possible, that I said something like that"?

And you recall my putting this question to you in court: "Do you remember making that answer before the grand jury?" And you recall your making this answer, under oath, just as you are seated there now, as a witness, "I probably made the answer. That's not the same thing that I told him to use a different address"? Do you recall making that answer in that way?

A. Yes, you talked about payment, concealing payment. You're talking about, now, concealing the address. That's two different things.

Q. Let me complete this, Mr. Ungar: "Q. I am not asking you for any opinion, Mr. Ungar. I am merely asking you the simple question: Did you give this testimony before the grand jury? A. I did.

[fol. 62] "Q. And is that testimony true? A. It was.

"Q. Is it true? A. It is, yes."

A. That's correct.

Q. Is that testimony true, that you gave before the grand jury?

A. Certainly.

Q. All right. So that it is true that you did say that you might have said to Bechtel that "if it became a matter of public information that I was paying for this, that it would be embarrassing to him. I mean I can't answer the exact language that I might have used but that's possible I said something like that." Do you remember saying that?

A. That's not the question you asked me before, though.

The Court: Strike out that answer.

Read the question, Mr. Reporter.

Q. You are saying—

The Court: Just a minute, Mr. Scotti. Maybe I am not keeping my voice up.

Strike the last answer.

Read the question.

(Whereupon, the next to the last question was read by the Court Stenographer, as above recorded.)

Q. In other words, you admit—

The Court: Let him answer.

Mr. Scotti: I'm sorry, your Honor. He is nodding his head affirmatively.

The Court: It doesn't do me a bit of good. I am not looking at the witness. I want to hear the answer.

(To the witness) What is the answer?

A. Yes.

[fol. 63] Q. So you do admit that it would be embarrassing if it were publicly known that you were paying for the alterations.

A. No—that Hulan thought it would be embarrassing.

Q. He thought it would be embarrassing?

A. Yes.

Mr. Scotti: I see. Page 655, Mr. Baker.

Q. Now, Mr. Ungar, you remember my putting this question to you: "Q. Mr. Ungar, will you listen to the question, please. Do you deny having an understanding with this man Bechtel not to reveal the fact that the repairs were being made at Hulan Jack's apartment? Is that simple enough? A. That I answered already and said yes, so it wouldn't be embarrassing.

"Q. You don't deny it? A. No, I do not deny it."

Mr. Baker: Not "it."

Mr. Scotti: "I do not deny," I'm sorry.

Q. (Continuing) And do you remember my saying, or asking you, this question in court: "Do you remember giving these answers before the grand jury?" And your making this answer as a witness in this court: "A. That's correct. But that is still not saying that I told him to put a false address?" Do you remember making that answer?

A. Yes.

Q. And that's correct?

A. Of course.

Q. In other words, you did admit last time in court that you did have an understanding with Mr. Bechtel not to reveal the fact that the repairs were being made at Hulan Jack's apartment—

A. No, my understanding was, with him, that he wouldn't reveal that I paid for it.

[fol. 64] Q. Now, Mr. Ungar, I shall reread the question put to you originally and the answer you made.

"Question (Page 655) Do you deny having an understanding with this man Bechtel not to reveal the fact that the repairs were being made at Hulan Jack's apartment? Is that simple enough?" And your answer before the grand

jury, "That I answered already and said yes, so it wouldn't be embarrassing."

Was that answer true before the grand jury?

A. I did not understand the question in the light in which you are asking it now.

Mr. Scotti: Now, your Honor—

The Court: Strike it out.

Mr. Scotti: I request that your Honor direct this witness to answer the question.

The Court: Disregard it, ladies and gentlemen.

Read the question, Mr. Reporter.

(Whereupon, the last question was read by the Court Stenographer, as above recorded.)

A. I would say the answer was incorrect, under those circumstances.

The Court: Strike that.

Q. Did you make that answer before—

The Court: Just a minute. Mr. Scotti, please!

Strike out the answer as not being responsive.

[fol. 65] I direct you, Mr. Witness, to listen to the question, and please respond to the question.

Read it, Mr. Reporter.

(Whereupon, the next to the last question was reread by the Court Stenographer, as recorded on Page 493.)

A. I would say the answer was incorrect, not true.

The Court: The question is, Was it true before the grand jury?

The Witness: I'd say—

The Court: What is your answer, please? What is your latest answer?

A. I would say the answer was incorrect.

Mr. Scotti: I submit, your Honor—

The Court: That's not the question.

Just a minute, Mr. Scotti, please!

Mr. Scotti: I'm sorry.

The Court: That's not the question.

The Witness: I can't answer whether it was true. I didn't understand the question.

The Court: Just a minute.

Strike out "I didn't understand the question."

(To the jury) And disregard it, ladies and gentlemen.

Pay no attention to it.

(To the witness) Was that answer before the grand jury true or false?

The Witness: I would say that that answer—

The Court: No, please, Mr. Ungar. Now that is a question that calls for one word.

[fol. 66] The Witness: I can't answer the question.

The Court: Then that's the answer.

The Witness: All right.

The Court: You say you cannot answer whether it was true or false?

The Witness: That's right.

The Court: Next question, Mr. Scotti.

Mr. Scotti: I now respectfully request the Court to direct this witness to answer the question.

The Court: Yes, you are directed to answer it, Mr. Witness.

The Witness: I can't answer it, your Honor.

The Court: Do you disobey my direction?

The Witness: I said I cannot answer the question.

The Court: I am directing that you answer that question yes or no. Was it true or was it false?

The Witness: I cannot answer the question, your Honor.

The Court: I direct you to answer it.

The Witness: I cannot answer it without an explanation, your Honor.

The Court: No, there is no explanation called for.

The question is: Was that answer true or false?

The Witness: I'm sorry, I cannot answer the question, the way your Honor propounds it.

The Court: I shall direct you once more, and it will be the last time, Mr. Witness.

[fol. 67] Was that answer before the grand jury true or false?

I shall not direct you again. This is the last time I direct you to do so.

The Witness: (No response.)

The Court: One way of refusing to answer a question, Mr. Witness, is to remain silent.

The Witness: If your Honor please, anything that I would say would not be accurate—

The Court: No, no. Strike it out.

The Witness: I will say, under the instructions of the Court—

The Court: No, no.

The Witness: —it is false.

The Court: No, Mister, you will say nothing of the kind.

The Witness: Your Honor is instructing me.

The Court: Mr. Witness, I am directing you to say nothing. Now please don't disobey the direction of the Court. I must make decisions here as the Judge. That is my decision. Now don't quarrel with it, Mr. Witness.

I am directing you to answer the question.

I have kept no track of time—

The Witness: I have answered the question, your Honor.

The Court: —but the witness has remained silent for some period of time (I don't know how long).

Do you wish to continue to remain silent, or will you follow the direction of the Court?

The Witness: I am trying—

[fol. 68] The Court: No, it's very simple, Mr. Ungar. The direction of the Court is that you answer that question. Was that testimony before the grand jury true or false?

The Witness: I cannot answer the question truthfully—

The Court: No, strike it out.

The Witness: —under oath, and the way your Honor is directing me to answer the question, and I have a right to tell the truth.

The Court: Stop that, Mr. Ungar. Now you are disobeying my second instruction.

You have violated the instruction not to add anything, Mr. Ungar, and I call your attention to the fact that you violated that instruction.

(To the jury): Now, ladies and gentlemen, we will take a recess until 2:15.

Do not discuss the case, and do not form or express any opinion.

(Whereupon, at 1:02 p.m., a luncheon recess was taken until 2:15 p.m.)

AFTERNOON SESSION

(2:15 p.m.)

(Mr. Scotti, Mr. Clark, Mr. Gasarch, Mr. Baker, Mr. Edmonds, and the defendant are present.)

(Whereupon, at 2:15 p.m., the jurors and the alternate jurors entered the courtroom and took their respective seats in the jury box.)

The Clerk: The People against Hulan E. Jack. The defendant and counsel present. The District Attorney is present. Jurors, please answer.

(Whereupon, the names of the jurors, and of the alternate jurors, were called by the Clerk of the Court, and each answered present.)

SIDNEY J. UNGAR, continued:

Direct examination.

By Mr. Scotti (continued):

Mr. Scotti: Your Honor, in order to preserve the continuity of my questioning, I would like to have the last question or the last two questions put to this witness, and whatever responses he made.

The Court: Yes.

(Whereupon, the question was read by the Court Stenographer, as follows: "Now, Mr. Ungar, I shall reread the question put to you originally and the answer you made. 'Question (Page 655) Do you deny having an understanding with this man Bechtel not to reveal the fact that the repairs were being made at Hulan Jack's apartment? Is that simple enough?' And your answer before the grand jury, 'That I answered already and said yes, so it wouldn't be embarrassing.'")

Q. Mr. Ungar, I ask you again: Was that answer before the grand jury true?

A. It was neither true, nor false.

The Court: Strike it out.

Now there is no sense in repeating it, Mr. Scotti. We have had it a number of times before the recess, and it now becomes a matter for the Court to consider.

Proceed to the next question.

Mr. Scotti: Thank you, your Honor.

[fol. 70]

EXHIBIT 3 TO PETITION

EXCERPT FROM PROCEEDINGS OF NOVEMBER 23, 1960
IN TRIAL OF HULAN E. JACK

Q. Now this letter that you sent Mr. Hechtel, People's Exhibit 2 in evidence, is a letter of authorization; is that correct?

A. I never sent People's Exhibit 2 in evidence.

Q. Who sent it, then?

A. I don't know. It came from my office. But I never said I sent it.

Q. Well now, you appreciate it's written on your stationery.

A. I do.

Q. And it says here (the copy says) "Very truly yours, Sidney J. Ungar."

A. There's no signature there.

Q. I understand. It's a copy. I understand that.

A. Yes.

Q. Did somebody else sign your name?

A. Any letter that's in my office would carry my name on it.

The Court: No strike that out.

The question is, Did anybody else sign your name?

The Witness: There's no signature on there.

The Court: Strike that out.

Did anybody else sign your name to the original letter?

The Witness: I don't know. I haven't seen the letter.

The Court: All right, you don't know.

Next question.

Q. (By Mr. Scotti) But you admit this was on your own stationery.

A. I do.

Q. Do you deny any knowledge of this letter of authorization?

A. I deny any—

Mr. Baker: That's objected to.

[fol. 71] The witness has testified it is not one of authorization, and he's phrased it, "Do you not deny this letter of authorization?"—

The Court: The objection is to the form of the question?

Mr. Baker: That is correct.

The Court: Will you rephrase—

Mr. Scotti: May I state the basis for the question, your Honor, by being permitted to read the first paragraph of the letter.

Mr. Baker: May I get a ruling first?

The Court: Objection overruled, with an exception to the defendant. Proceed.

Q. "I am sending you this letter to supplement the agreement made on the 15th of January 1958 with respect to the work to be done in the above premises and approving certain additional work and extras which I have authorized you to do in said apartment." Whose language was that?

A. I wouldn't remember.

Q. Do you deny having dictated this letter?

A. At this point I have no recollection. I cannot deny or affirm.

Mr. Scotti: Your Honor, I respectfully request that you direct this witness to answer the question.

The Court: The answer now given by the witness is stricken out, and the witness is directed to answer the question.

A. I cannot deny or affirm that I dictated the letter.

The Court: Strike that out.

[fol. 72] Read the question, Mr. Reporter.

(Whereupon, the last question was read by the Court Stenographer, as above recorded.)

Mr. Baker: That's objected to, if the Court please. There is no testimony the letter was ever dictated.

The Court: Objection overruled.

Mr. Baker: Exception.

The Court: Do you understand the question, Mr. Witness?

The Witness: I do.

The Court: What is the answer?

The Witness: I have no recollection.

The Court: Strike it out.

Now I direct you, Mr. Witness, not to give that answer again.

You understand this last direction?

The Witness: I do.

The Court: Now read the question, Mr. Reporter.

(Whereupon, the last question was reread by the Court Stenographer, as above recorded.)

A. I cannot deny it, nor affirm it.

The Court: All right, I think that's enough, Mr. Scotti.

Mr. Scotti: All right, your Honor.

The Court: That is a matter that the Court will have to consider. Proceed.

[fol. 73]

EXHIBIT 4 TO PETITION

EXCERPTS FROM PROCEEDINGS OF NOVEMBER 25, 1960

IN TRIAL OF HULAN E. JACK

Q. What discussion did you have concerning the records?

A. We were trying to find the record of my payments for this job, and Mr. Liben was going back and forth, and I have already testified that we found one check—

Mr. Scotti: Strike that out, what he already testified to, your Honor.

The Court: Wait a minute. You are making a motion?

Mr. Scotti: I'm sorry. May I respectfully request that that be stricken out?

The Court: Yes, it is stricken out.

Mr. Witness, maybe my notes are wrong. I have a note here that you did testify only a few minutes ago that Bechtel was asked to bring all his records to your office the next morning.

Now let's go back a minute. At some time before you parted from Mr. Bechtel that Friday night, was he told, by you or anybody else in your presence, to bring all of his records to your office the next morning?

Now I heard the name of a Mr. Rosenblatt, Mr. Liben. I am not interested in who said it. But was it said to Mr. Bechtel? Yes or no.

The Witness: It was suggested—

The Court: Was it said to Mr. Bechtel, yes or no?

The Witness: It was suggested—

The Court: Was it said? I don't care. Don't let's quibble over words.

[fol. 74] The Witness: It was said to Mr. Bechtel.

The Court: Period. Now let's proceed, Mr. Scotti.

The Witness: He asked me a question, your Honor, which I was half-way in the middle of answering, when he interrupted.

The Court: You are contemptuous. You insist on being a judge. It is none of your business, Mr.—

The Witness: I have a right to answer questions, your Honor.

The Court: Will you please desist. Proceed, Mr. Scotti.

The Witness: If your Honor please, we are not getting the correct story here.

The Court: Mr. Ungar, I am asking you now, as a judge, not to volunteer anything.

The Witness: I am only trying to tell the truth here, Judge.

The Court: And you insist on volunteering. Strike that out.

(To the jury) Disregard it, ladies and gentlemen. Proceed.

Q. When you told Mr. Jack that there was now a full scale investigation before the grand jury, what did Mr. Jack tell you?

A. Well, that's only a small part of what I told him.

Mr. Scotti: Your Honor, I move to strike this out.

The Court: Motion granted.

Mr. Scotti: I must observe, for the record, your Honor, [fol. 75] that the witness is a lawyer of great experience and familiarity with courtroom procedure.

The Court: There is no need for this, Mr. Scotti.

I have already indicated that this man is not just an ordinary witness, but that he is a lawyer. I don't know how many times we can say it. But this is a trial and we will proceed with it.

Q. I repeat the question: When you told Mr. Jack there was now in progress a full scale grand jury investigation, what did Mr. Jack tell you?

Mr. Baker: Objected to. There is no testimony he told him anything.

The Court: Overruled.

Mr. Baker: Exception.

A. He didn't respond to just one simple statement. It was part of a conversation, and I can't distinguish one sentence from another in a half-hour conversation the full details of which I don't recollect.

The Court: Strike that all out.

Mr. Witness, you have testified that you told the defendant, Mr. Jack, that a full scale investigation about this matter had been started before the grand jury; is that correct?

The Witness: That's part of what I told him, your Honor. It was part of a statement.

The Court: I didn't ask you that.

The Witness: I can't separate, your Honor, I'm sorry. [fol. 76] I'm here to tell the full truth, and I can't give part of a statement, and I don't think it's fair to ask for part of conversations—

Mr. Scotti: I object to this statement, your Honor.

The Court: Mr. Scotti, I am dealing with the witness. May I finish, please.

Now, in the first place, Mr. Ungar, there is no need for you to raise your voice. I am sure we can all hear you.

Now strike out the entire answer.

(To the jury) And disregard it, ladies and gentlemen.

(To the witness) Now I repeat: As I understand your testimony, you told Mr. Jack a full scale investigation had now been started before the grand jury about this matter; is that correct?

The Witness: If your Honor please, I want to recess at this point. I can't testify. I am too upset, and I am much too nervous. And I can't testify under these circumstances. I am not being a voluntary witness. I am being pressured and coerced and intimidated into testifying, and I can't testify under these circumstances.

The Court: Disregard the statement, ladies and gentlemen.

This man was subpoenaed as a witness. If there is one right that any organized state must have, it seems to me it is the right to have the testimony of a witness in the administration of justice.

Now this man has been subpoenaed and he is a witness, no different than any other witness. No matter how high or [fol. 77] low his station in life, he is entitled to exactly the same rights as any other witness, no more and no less.

Mr. Scotti: May I proceed, your Honor?

Mr. Baker: May I be heard—

The Court: Well, the witness has asked for a recess.

The Witness: I also ask for the right to have counsel, if your Honor please. I don't think that I am being accorded the rights of any other witness, as your Honor indicated, definitely not.

I am being badgered by the Court and by the District Attorney.

Mr. Baker: May I at this time—

The Court: Ladies and gentlemen, please disregard that statement.

Mr. Baker, this is a matter between the witness and the Court up to now. I stopped Mr. Scotti. Now you may have something to say which is pertinent and I will listen to it. But I merely call your attention to the fact that the Court has the problem, as you well know, of presiding at a trial.

making rulings; and my conversation with this witness has to do with that, to try to have an orderly trial.

Now what is it that you wish to say?

Mr. Baker: May I at this time, if the Court pleases, for the reason of the incident relative to the witness and the colloquy between the Court and the witness, or direction, state it is prejudicial to the interests of the defendant, and I move for the withdrawal of a juror.

The Court: Your motion is denied.

Mr. Baker: Respectfully except.

[fol. 78] The Court: We shall pause for a minute or two, Mr. Witness.

(Whereupon, there was a brief interval of silence in the courtroom.)

The Witness: I can't testify, your Honor. I am shaking all over. And I must have a recess, I just am absolutely a bundle of nerves at this point, and I don't know what I'm doing or saying any more.

I ask for the privilege of leaving the stand, your Honor.

The Court: No, you will remain on the stand.

The Witness: I can't testify, I'm sorry, your Honor. I am not in any physical or mental condition to testify.

The Court: Mr. Witness, no one asked you anything. Nobody is questioning you. You are not testifying. We have taken a recess for about three minutes of silence, and we will take a few more minutes.

The Witness: I would like to leave the stand, your Honor.

The Court: No, you may not leave the stand.

(Whereupon, there was a further brief interval of silence in the courtroom.)

The Court: Proceed, Mr. Scotti.

The Witness: I am not going to answer questions, your Honor. I am not going to testify in this confusion, and the Court nor anyone else will make me testify in this emotional state. I am absolutely unfit to testify because of your Honor's attitude and conduct towards me. I am being

[fol. 79] coerced and intimidated and badgered. The Court is suppressing the evidence.

The Court: You are not only contemptuous but disorderly and insolent.

The Witness: I have asked for the privilege of leaving the stand for five minutes.

The Court: Put your question, Mr. Scotti.

Mr. Baker: May I renew my motion?

The Court: The motion is denied.

Mr. Baker: Excepcion.

Q. Mr. Ungar, did you tell Mr. Jack that Saturday morning that there was a conflict between your story to me and Mr. Bechtel's story to me?

A. I can't answer any questions. I am not even concentrating on what you are saying. I can't even think clearly at this minute any more.

The Court: Do you refuse to answer?

The Witness: I don't know what he is talking about, Judge. I am an emotional wreck at this time. I am asking for a recess. I ask the right to get off this stand so that I can contain myself.

The Court: Do you refuse to answer the question, Mr. Ungar?

The Witness: I said I can't answer the question, your Honor.

The Court: Put the question, Mr. Reporter.

Mr. Scotti: Mr. Reporter, read the question.

(The question was read by the Court Stenographer as follows:

[fol. 80] "Q. Mr. Ungar, did you tell Mr. Jack that Saturday morning that there was a conflict between your story to me and Mr. Bechtel's story to me?")

The Court: Let the record show that the defendant has remained silent and has not answered the question for four minutes.

Mr. Scotti: You mean the witness, your Honor.

The Court: What did I say?

Mr. Scotti: The defendant.

The Court: Obviously I meant the witness. Very well, we will advance our luncheon recess.

Do not discuss the case, ladies and gentlemen, do not form or express any opinion as to the guilt or innocence of this defendant until the case is finally submitted to you. Since we are advancing the hour when we start our luncheon recess, we will get back here at 1:45. You may retire.

(The jurors then left the Court room and the following took place in their absence:)

Mr. Baker: May I be heard before the Court leaves?

The Court: Yes.

Mr. Baker: There has been a statement made by the witness that he is emotionally or mentally incapable of testifying. So that the record would be crystal clear, I make a request of the Court to appoint a doctor to determine [fol. 81] whether or not there is malingering on the part of the witness or anything of the sort.

The Court: In my judgment, this is as near as malingering could ever be determined from my observation.

The Witness: I join in that request, if your Honor please.

The Court: What is the ground of your application?

Mr. Baker: The ground of my application is, if the Court please, the law presumes that when a witness testifies he is to be lucid. This witness says he is not. Any testimony he gives may be prejudicial to the rights and interests of the defendant. That's the ground of my objection, and so that the record would be clear, whether this is malingering or not, there is a mental and emotional condition presently existing in this witness so that he could not be a competent witness to testify, all of which may be to the detriment of the defendant.

The Court: I shall reserve decision on your application and I shall direct the witness to remain in court until I decide it. The Court will take a recess until 1:45.

(After a short recess the Court returned to the courtroom, Mr. Baker and the defendant being present, and the following took place:)

The Court: Mr. Baker, I wanted to get both sides here. The reason I have asked Mr. Ungar to remain was because

if I had made a decision, why, then, I could have acted on it. [fol. 82] Since I haven't made a decision I see no point in having him remain here. He is entitled to take his luncheon recess the same as anybody else, but I didn't want to lose time if I could help it.

Mr. Baker: I am glad the Court indicated the purpose of asking the witness to remain.

The Court: That was the only purpose, because I said to you I reserve decision, and I thought I might be able to decide it and save time. Would it be a burden to give me another five minutes?

Mr. Baker: No, your Honor.

The Witness: Is your Honor addressing me?

The Court: Yes.

The Witness: No, it is not a burden, your Honor, because I was not malingering, and I have been shaking ever since this issue started.

The Court: I just want five more minutes, and if I don't decide it by that time then we will all go to lunch.

(A short recess was taken; the Court left the courtroom and returned.)

The Court: Mr. Ungar, I haven't made up my mind what course of action I should take. I think you ought to take a recess until 1:45. Let us see what the situation is at that time.

[fol. 82a]

COURT OF GENERAL SESSIONS

COUNTY OF NEW YORK

Part VI

November 1960 Term Continued

In the Matter

of

THE CRIMINAL CONTEMPT

of

SIDNEY J. UNGAR,

Respondent.

EXCERPTS FROM COURT'S EXHIBIT 3 TO
CONTEMPT HEARING OF DECEMBER 13, 1960

PROCEEDINGS OF NOVEMBER 25, 1960

AFTERNOON SESSION

(1:45 p.m.)

(Mr. Scotti, Mr. Clark, Mr. Baker, Mr. Edmonds and the defendant are present.)

(Whereupon, at 1:50 p.m., the jurors and the alternate jurors entered the courtroom and took their seats in the jury box.)

The Clerk: People of the State of New York against Hulan E. Jack. The defendant and counsel present. The District Attorney is present. The jurors, please answer.

(Whereupon, the names of the jurors and of the alternate jurors were called by the Clerk of the Court, and each answered present.)

SIDNEY J. UNGAR (continued):

The Court: Now, Mr. Witness, before we took a luncheon recess you personally, as a witness, had asked for a recess. Do you recall that?

[fol. 82b] The Witness: I do, your Honor.

The Court: Now that we have had the luncheon recess and you have come back, do you still ask for a recess?

The Witness: Well, I would like to report to the Court that I went to the hospital and received an injection, and I think that I can proceed temporarily, in addition to the pills that I have taken this morning.

The Court: Very well.

Mr. Scotti: May I proceed, your Honor?

The Court: Yes.

[fol. 82c] SIDNEY J. UNGAR resumed the stand and testified further as follows:

Cross examination.

By Mr. Baker (Continued):

Q. By the way, Mr. Ungar, you testified on direct examination that you had a shot at the hospital, is that correct?

A. Yes.

Q. Do you know what it was?

A. Yes.

Q. Can you tell us whether or not it has affected your mental processes?

Mr. Scotti: I object to that, your Honor. I think his conduct, manner and his testimony speak for themselves.

The Court: Mr. Witness, when we resumed court after the luncheon recess I asked you—rather, I stated that before we took the luncheon recess you personally had asked for a recess. Do you recall your asking for it?

[fol. 82d] The Witness: I do.

The Court: And do you recall my opening up that subject the very first thing when we resumed?

The Witness: I do.

The Court: Do you recall what answer you gave with regard to whether you still wanted a recess?

The Witness: I do.

The Court: Would you mind repeating it?

The Witness: I said I thought I could go on because I had an injection. I took a number of pills this morning and last night.

The Court: The objection is sustained.

Q. The indictment indicates, does it not—have you ever seen it?

A. I believe I did, once.

Q. Do you know that you were charged in this indictment as being a co-conspirator but not a defendant?

A. I did.

Q. And you are a lawyer, are you not?

A. I am.

[fol. 82e] Mr. Baker: May I indicate something on the record? It has nothing to do with the—

The Court: Yes, certainly.

You are excused, Mr. Witness.

Mr. Baker: If the Court please, on Friday, after several outbreaks by the witness, Mr. Sidney Ungar, and his declaration that he was physically and emotionally unable to proceed as a witness, counsel for the defense made an application to the Court to have a doctor examine the witness so as to determine whether or not the incidents were the product of machinations of his mind, referred to as malingering, or whether in fact there was a physical and psychological impediment.

The Court reserved decision on the matter and counsel for the defense and the witness remained within calling distance of the Court.

The Court re-entered the court room and indicated that he had not made a determination as to the application, and all parties went to lunch.

On reassembling at this trial after the luncheon recess, the Court did not indicate what decision he had made on the application for an examination by a Court-appointed doctor as to the capacity of the witness to testify, but it ap-

pears from the record that the Court inquired of the witness whether he could continue, and without being precise, the answer was, "I think I can."

May I respectfully state to the Court that after the return of the witness to the stand, and after a statement by the witness that he had received a shot and taken some pills, the witness answered questions in an uninteresting, docile-like manner, which leads counsel for the defense to believe that either there was a continuation of malingering or that [fol. 82f] there in fact was some psychological, physiological defect present in the witness during the incident.

Counsel for the defense is further aware that time is of essence insofar as malingering or psychological condition is concerned, and that not as of this particular moment has the Court passed upon the application.

For that reason and for reasons previously stated to the Court, I respectfully move for a mistrial and the withdrawal of a juror.

The Court: Motion denied.

Mr. Baker: Thank you, your Honor.

Mr. Scotti: Your Honor, for the purpose of the record, there is suspended here decision on the motion, even though there is no necessity to formalize for the record what your Honor's ruling is on that motion. May I suggest that there be no doubt about your ruling on that motion? I don't think you have indicated it, although by allowing the witness to testify there was implicit in that the fact that you overruled the motion or denied the motion.

The Court: I thought it was obvious to everyone that when the witness resumed the stand at 1:45 P.M. after the luncheon recess, and the Court asked the witness whether his request for a recess while testifying on the stand, and before the announcement of the luncheon recess, still stood. The witness said he had been to a hospital to get a shot, and that he could.

Mr. Scotti: That he could proceed temporarily.

[fol. 82g] The Court: That he could proceed temporarily, and I thought that everyone then understood that the witness himself had concluded the issue by declaring that he was then able to proceed, and consequently made no formal declaration on the record.

To avoid any possible question about that I now deny the motion.

Mr. Baker: May the record indicate a denial of the motion was made on Monday following the application?

The Court: I don't know how the record could indicate anything else, Mr. Baker.

Mr. Baker: Very well, your Honor.

[fol. 83]

EXHIBIT 5 TO PETITION

SUMMARY AND EXCERPTS OF MINUTES OF BOARD OF ESTIMATE

MEETING OF OCTOBER 24, 1957

PRESENT—Robert F. Wagner and John J. Theobald; Louis Cohen, Deputy Comptroller; Abe Stark and James P. Regan, Hulan E. Jack and Thomas P. Lawless, John Cashmore and Charles A. Reidel, James J. Lyons and Charles F. Rodriguez, James A. Lundy and John J. Horan, Albert V. Maniscalco and Cornelius Bregoff.

Mayor presided Calendar No. 24, 52, 222-287, 289-309, 311-489, 491.

Stark presided 1-23, 25-51, 53-221, 288, 310, 490.

Total number of items on calendar: 491.

Committee on A & D: Items 54-192.

Lease items within A & D matters: 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74.

Other items: Sales at public auction: 74-94; Sale and removal of encroachments: 95-96; Assignment of property: 97-98; Release of covenants, etc.: 99-107; Mortgage extensions: 108-110; Cancellation of water charges: 111-184; Modification of mortgage: 185; Refunds of deposits: 186-189; Correction deed: 190; Release of city's interest: 191-192.

Real Estate report on 299 lease dated 10-15-57.

Excerpts:

"* * * In two communications dated 12-11-56 and 2-19-57 the Dept. of Personnel requested the renewal of the two

leases above referred to, for a further 5 year period and [fol. 84] also requested that the performance by the landlord of certain alterations and new installations" * * * all at a total estimated cost to the landlord of approximately \$55,000. * * * "After extensive negotiations the Director of Real Estate has obtained an offer of a longer lease on terms which he considers to be in the City's interest and which are more fully described below" * * *.

"The Director of Real Estate has consulted with the Director of the Budget for the purpose of resolving the problem as to the length of lease which would be advisable in view of the possibility of the City's construction of a new administration building with the following results:

"The landlord had originally demanded a straight ten-year non-cancellable lease on the following terms:

- "a) Rent until 1-1-58 to remain at \$1.90 per sq. ft.
- b) Rent from 1-1-58 to 6-30-59 at \$2.65.
- c) Rent from 7-1-59 to 6-30-60 at \$2.90.
- d) Rent from 7-1-60 to 12-31-67 at \$3.00.

Consultation with the Budget Director with respect to the request for a ten year lease elicited the suggestion that efforts be made instead to obtain a five year or a ten year lease with cancellation privileges after five years.

"The landlord of the premises, however, advised the Director of Real Estate on October 8, 1957, that they could [fol. 85] not consider a new lease on these terms because the bank which holds the first mortgage on the building would not consider a lease on these terms as a basis for a refinancing of the mortgage.

"The landlord, however, submitted an alternate proposal on the following terms:

"A new lease for a period of six years and four months, commencing with January 1, 1958, and terminating on April 30, 1964, but otherwise on the same terms as those of the ten year lease first proposed with the single exception that the landlord be not required to replace the elevator doors as originally requested by the Personnel Dept. * * *.

"In brief, the new offer of the landlord was for a lease for a period of six years and four months as follows:

- "a) Rent to 1-1-59 to remain at \$1.90.
- b) Rent from 1-1-59 to 6-30-59 at \$2.65.
- c) Rent from 7-1-59 to 6-30-60 at \$2.90.
- d) Rent from 7-1-60 to 4-30-64 at \$3.00.

"The Budget Director was again consulted as to the advisability, for the reasons above cited, of entering into a new lease for the period of six years and four months suggested by the landlord and on October 11, 1957, he advised the Director of Real Estate that in his opinion, a lease for this period and on the terms above outlined would be advantageous to and in the best interest of the City."

[fol. 86] Adopted by the following vote:

Deputy Mayor

Deputy and Acting Comptroller

President of the Council

President of the Borough of Manhattan

President of the Borough of Brooklyn

Acting President of the Borough of Bronx

President of the Borough of Queens

Acting President of the Borough of Richmond

EXHIBIT 6 TO PETITION

ORDER TO SHOW CAUSE

At a Term of the Court of General Sessions held in and for the County of New York at the Court House in the County of New York, State of New York, Part VI, November, 1960 Term Continued, on the 8th day of December, 1960.

Present—Honorable JOSEPH A. SARAFITE, Judge.

In the Matter

of

THE CRIMINAL CONTEMPT

of

SIDNEY J. UNGAR

On my own motion, as a Judge of the Court of General Sessions presiding in the case of People against Hulan E. Jack, in Part VI, November, 1960 Term continued, of said Court, it is

ORDERED, that the respondent Sidney J. Ungar show cause before me, at a Part VI, November, 1960 Term continued, of the Court of General Sessions in the Criminal Courts Building, to be held in Part II courtroom thereof, 100 Centre Street, City and County of New York, on the 13th day of December, 1960, at 10 o'clock in the forenoon of that day, or as soon thereafter as he can be heard, why he should not [fol. 88] be punished for criminal contempt of court, committed on November 25, 1960, as hereinafter specified.

On November 22, 1960, the respondent was duly sworn as a witness in the trial of the case of *People v. Hulan E. Jack*, then on trial before me in Part VI, November, 1960 Term, continued and gave testimony. He testified further on November 23, 1960 and November 25, 1960.

It was evident to the Court from the very beginning of the respondent's testimony that he had embarked upon a course of conduct designed to obstruct the orderly proceedings of the court. As will appear from the facts hereinafter recited, the respondent, during the sitting of this Court and in its immediate view and presence, and in an effort obvious to the Court to disrupt the orderly course of said trial, in a loud, disorderly, contemptuous and insolent manner directly tending to interrupt the proceedings of the Court and to impair the respect due to the authority of the Court, knowingly and wilfully persisted in refusing to abide by and follow the rulings and instructions of the Court as to the content of the answers to be made by the respondent, and in the same obstructive manner committed on November 25, 1960 the cited criminal contempt of court as follows:

NOVEMBER 22, 1960

On the appearance and after the swearing in of the respondent the following transpired:

(1)

(Trial Min. pp. 332-334)

"The Court: Call your next witness.

[fol. 89] "Mr. Scotti: The People call Mr. Ungar.

"The Court: Now ladies and gentlemen, insofar as you are concerned, we will now take a recess until 2:15. Do not discuss the case and do not form or express any opinion. You may retire.

"(Whereupon, there was a conference at the bench, out of the hearing of the members of the jury, between the Court and counsel for both sides, in the course of which the following proceedings were on the record:)

"The Court: Please stand near, Mr. Ungar, so that you will hear this.

"Let the record note that I received a letter from this witness dated November 15, 1960, in which he enclosed a letter by his attorney to the District Attorney dated September 29th, that is, a copy of that letter, and then a copy of a response from the District Attorney dated October 4th, and

also a copy of a letter sent by this witness to Mr. Scotti dated October 27th.

"In his letter the witness asks the Court to do three things:

"One is that he be permitted to examine the Court's copy of his previous testimony in this case.

"Two, that he be considered the Court's witness.

"And third, that a copy of his communication and enclosures be incorporated in the minutes of the trial.

"I had an answer prepared to mail to this witness, but [fol. 90] before it was mailed I received word that he had telephoned my chambers and asked whether or not he could serve certain papers on me.

"On November 17, 1960 the witness did bring some papers here into court and had them delivered to me. These papers are on legal cap, and on the back it states, 'Notice of Motion, Affidavit and Exhibits.'

"In my opinion, these papers do not constitute any proper motion and I do not so recognize them. Indeed, they are dismissed insofar as that denomination is concerned. However, I will consider them as an amplification of the letter which the witness did send to me.

"Now, the first sheet of legal cap asks for an order determining the status of the witness. I am now quoting:

"Sidney J. Ungar shall be considered as if he had been called by the Court, and that the said witness be given the protection of the Court against any improper, unfair, collateral or irrelevant questions by either the District Attorney or the defendant's counsel, and for a further order permitting the witness to refresh his recollection on any details he may not recall by reference to his former testimony thereon, and for such other and further relief as this Court may seem just and proper.'

"In my judgment, there is no merit whatsoever to these papers of legal cap, and I am not treating it as a motion. However, I am treating the requests in the letter and those [fol. 91] in this paper as requests addressed to the Court in camera, and in view of my opinion that there is no merit to any of the requests, they are all denied."

Thereafter, after some questioning of this witness by the People, the following occurred in open court in the presence of the jury:

(2)

(Trial Min. pp. 394-398)

"Q. You had discussions?

"A. A preliminary discussion with Mr. Gale. If you want me to tell you what he said I will be glad to.

"Q. Mr. Ungar, just confine your answers to my questions.

"A. I am sorry.

"Q. You discussed this matter of the lease with Mr. Gale and with Mr. Cymrot, is that correct?

"A. No. I can't accept the way you put that question. I discussed—

"The Court: No.

"The Witness: No, I can't accept that.

"The Court: It is not a question of whether you accept it, it is a question of whether you can answer it.

"The Witness: I can't answer that question that way.

"The Court: Next question.

"Q. The point is, you did discuss the matter of the lease with Mr. Cymrot and Mr. Gale, am I correct?

"A. I don't know how to answer that question the way you frame it because—

[fol. 92] "The Court: That is enough. Next question, Mr. Scotti. Did you talk to these people?

"The Witness: Yes.

"The Court: Did they talk to you?

"The Witness: Yes.

"The Court: About the lease, the terms of the lease?

"The Witness: No.

"The Court: Next question.

"Q. While you were negotiating with the owners of 299 Broadway concerning the purchase of this property, did you discuss the matter of the proposed lease with Mr. Jack?

"A. Will you repeat that question, please?

"The Court: Read the question.

"(The question was repeated as follows by the Court Stenographer: 'Q. While you were negotiating with the owners of 299 Broadway concerning the purchase of this property; did you discuss the matter of the proposed lease with Mr. Jack?')

"A. Well, I was negotiating the contract. Is that your question, sir?

"The Court: No.

"The Witness: I can't answer that question.

"The Court: Do you understand the question?

"The Witness: No, I don't.

"The Court: We will read it again.

"(The question was again repeated by the Court Stenographer.)

"The Witness: No.

[fol. 93]. "Q. Let me put this question to you, then: Did there come a time while you were discussing with the owners of 299 Broadway—I withdraw the question. When the lease, the proposed lease had been submitted by the Bureau of Real Estate to the Board of Estimate for their consideration, and before the scheduled date for a hearing before the Board of Estimate, which was October 24, 1957, is that when you discussed this matter of the proposed lease with the defendant, Mr. Jack?

"Mr. Baker: Just a moment. Objected to. There is no testimony that there was any proposed hearing before the Board of Estimate. I object to it as to form.

"The Court: Overruled.

"Mr. Baker: Exception.

"A. I can say only at this time I do not remember. I can only remember what you refreshed my recollection about, as to the testimony I gave in the Grand Jury on this subject.

"Q. You say that when you are mindful of the fact that I had refreshed your memory with respect to this matter?

"A. No, I am mindful of the fact that you read to me certain testimony that I had given before the Grand Jury on

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"A. I am sorry.

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"The Court: No.

"The Witness: No, I can't accept that.

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"The Court: Did they talk to you?

"The Witness: Yes.

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"Q. While you were negotiating with the owners of 299 Broadway concerning the purchase of this property, did you discuss the matter of the proposed lease with Mr. Jack?

"A. Will you repeat that question, please?

"The Court: Read the question.

"(The question was repeated as follows by the Court Stenographer: 'Q. While you were negotiating with the owners of 299 Broadway concerning the purchase of this property, did you discuss the matter of the proposed lease with Mr. Jack?')

"A. Well, I was negotiating the contract. Is that your question, sir?

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"The Court: Do you understand the question?

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"Mr. Baker: Just a moment. Objected to. There is no testimony that there was any proposed hearing before the Board of Estimate. I object to it as to form.

"The Court: Overruled.

"Mr. Baker: Exception.

"A. I can say only at this time I do not remember. I can only remember what you refreshed my recollection about, as to the testimony I gave in the Grand Jury on this subject.

"Q. You say that when you are mindful of the fact that I had refreshed your memory with respect to this matter?

"A. No, I am mindful of the fact that you read to me certain testimony that I had given before the Grand Jury on

this matter, but I cannot recall the conversations. I didn't recall it the last time and I do not recall them now, but I will adopt what you said in the Grand Jury if I said it there.

Mr. Baker thereupon requested a conference at the bench. [fol. 94] Counsel for both sides had a discussion with the judge at the bench out of the hearing of the jury, after which the following took place on the record in open court in the presence of the jury:

"The Court: Now, Mr. Witness, the subject matter discussed at the bench with the Court related to your volunteering about the Grand Jury, concerning which you were not asked anything, and it created a problem here which the lawyers discussed, which Mr. Baker raised with the Court. There would have been no such problem if you had not referred to Grand Jury testimony.

"Now, may I please ask you when you are asked a question, just answer yes or no, please. Don't volunteer anything.

"Proceed."

The District Attorney then asked three more questions. After the respondent had answered them, the following answers were made by him in open court in the presence of the jury:

(3)

(Trial Min. pp. 399-401-A)

"Q. You testified at the last trial about this matter; do you recall?

"A. I certainly did.

"Q. Have you a recollection of the testimony you gave at the last trial?

"A. To a degree.

"Q. Concerning this particular matter?

"A. Yes.

"Q. Please tell us.

"A. What my recollection is?

[fol. 95] "Q. Yes?

"A. My recollection is at the last trial I testified that I did not recall any specific conversation, that if there was a conversation with him that it was a casual conversation, one of many thousands; that I might have mentioned to him that I was buying this property and that it would come up before the Board of Estimate for approval, or something like that, but I could not actually remember the details, and I did not remember when, where, how or the circumstances under which this happened. This is my opinion as to what I testified to.

"Q. You had not read this testimony, I take it?

"A. No.

"Q. This is your recollection of your previous testimony?

"A. Yes.

"Q. Now, you did testify that you probably mentioned casually to him that you were buying this property and that the city was the lessee, and do you recall saying this at the last trial—

"Q. 'I can't tell you in substance because I have no independent recollection of any conversation. I probably mentioned casually to him that I was buying this property, and that the city is the lessee, and I think I said that half a dozen times too.'

"Q. Was that correct?

"A. Just a minute. I don't know what you mean by the last part of what you are reading. I probably said in my testimony half a dozen times, not that I spoke to him, the defendant, a half a dozen times.

[fol. 96] "The Court: Mr. Witness, try not to do that, please. Just listen to the question. The questioner is asking you, 'Did you testify as follows at the last trial?' Try to confine your answer to that question.

"The Witness: May I look at the testimony?

"The Court: No, you may not look at the testimony. You have been asked a question. Put your question, Mr. Scotti. Will you read the question, Mr. Reporter?

"(The question was repeated as follows:

"Q. Now, you did testify that you probably mentioned casually to him that you were buying this property and that the city was the lessee, and do you recall saying this at the

last trial: 'I can't tell you in substance because I have no independent recollection of any conversation. I probably mentioned casually to him that I was buying this property, and that the city is the lessee, and I think I said that half a dozen times too.' Was that correct?')

"Q. Do you recall that testimony? "

"A. No, I don't recall giving the testimony—

"The Court: Period. That is an answer to the question. The answer could have been only one word. The answer is, 'No, I do not recall,' period. It is as simple as that."

The court then adjourned to November 23, 1960.

[fol. 97]

NOVEMBER 23, 1960

On November 23, 1960, the respondent, again appeared as a witness and the following transpired in open court in the presence of the jury:

(4)

(Trial Min. pp. 403-404)

"Q. Now, do you recall, Mr. Ungar, at the last trial—

"Q. (continued)—my confronting you with Grand Jury testimony?

"A. I do.

"Q. As follows: 'Q. Do you remember your stating before the Grand Jury that you mentioned to him, and I will quote your language, 'I mentioned to him that the matter was coming up before the Board of Estimate?' Now, do you recall my putting this question to you in court at the last trial? Do you remember making that statement?

"A. You have to stop there. I am not following you.

"The Court: No, no, please don't do that. It is not for you to say to any examiner, 'You have to stop there.' That is none of your business. Don't do it again, please. The examiner, be he the District Attorney or defense counsel, has a right to phrase a question and it is not for you to lecture him whether he should stop there. If you don't understand, just wait until he finishes and then say, 'I don't understand.'

"The Witness: I am sorry.

"The Court: Please don't do that again, Mr. Ungar.

[fol. 98] "The Witness: All right.

"The Court: Do you understand it?

"The Witness: I do."

After further questioning of the respondent, the following testimony was given by him in open court in the presence of the jury.

(5)

(Trial Min. p. 418)

"Q. Did you use that expression at the last trial, Mr. Jack opened many doors for you?

"A. I used that phrase as a figure of speech, and I just described how he opened doors where I had trouble to see people.

"The Court: The question was, did you use that expression at the last trial?

"The Witness: Yes, as a figure of speech."

Thereafter, the following testimony was given by the respondent in open court in the presence of the jury:

(6)

(Trial Min. pp. 435-436)

"Q. What was the stock interest?

"A. Well, to be exact; I don't know whether the stock interest was in my name or in the name of Jar; that I would have to examine the records to determine.

"Q. Whether it was in your name or in the name of Jar, you—I am asking you personally what interest did you have? Did you own the stock?

"A. I can't answer that question because I don't know [fol. 99] whether at this point—whether I put the stock in my personal name or in the name of Jar Realty, which was a corporation in which I was the sole stockholder.

"Mr. Baker: I move to strike out the latter portion.

"The Court: Strike it out.

"Mr. Witness, regardless of the names or the numbers of corporations, did you have a financial interest in the ownership of 299 Broadway—not necessarily personally, but through the ownership of stock in corporations? Yes or no?

"The Witness: Well, I want to answer your Honor's question—

"The Court: Just a minute. If you can't answer it yes or no, just say so.

"The Witness: No, I can't answer it yes or no.

"The Court: You can't. All right.

"Proceed, Mr. Scotti. He cannot answer it yes or no.

On permission of the Court, the District Attorney then questioned the respondent in open court in the presence of the jury as follows:

(7)

(Trial Min. pp. 436-441)

"Q. What interest did you have in the corporation that owned 299 Broadway, the syndicate that owned it?

"A. The interest that I had in 299 Broadway was either in my name or in the name of the Jaré Realty and I can't—I would have to look at the record—

[fol. 100] "Mr. Scotti: I move to strike it out as not responsive to the question, your Honor.

"The Court: Strike it out.

"As you sit there now, Mr. Ungar, do you have any interest at all in the ownership of 299 Broadway? A. Yes or no.

"The Witness: I do.

"The Court: What is your interest?

"The Witness: Stock interest.

"The Court: How much?

"The Witness: Ninety-seven shares.

"The Court: All right. Ninety-seven shares.

"By Mr. Scotti:

"Q. You own ninety-seven shares of the Duane-Broad Corporation?

"A. I do.

"Q. Incidentally, Mr. Ungar—

"Mr. Baker: May it be indicated that he says 'as of today.'

"The Court: Yes, that is correct. That was my question. I said, 'As you sit there.'

"Q. As of January 1958—

"Mr. Scotti: Thank you, Mr. Baker.. I was about to ask that. I want to clarify the record.

"Q. (Continuing)—what was your interest in the syndicate known as the Duane-Broad Corporation.

"A. I have to refer to the records to tell you whether I owned it at that time in my name or in the name of a corporation that I was the head of. I can't tell you offhand.

[fol. 101] "The Court: But, Mr. Witness, I thought I asked you before, regardless of whose name it's in, in dollars, what was your interest in this building in January 1958?

"Now can you answer that yes or no?

"The Witness: Yes, in that way, yes.

"The Court: You can?

"The Witness: Yes, I can.

"Mr. Baker: If your Honor please—

"The Court: You object to the question?

"Mr. Baker: I object to the question.

"The Court: Overruled.

"Mr. Baker: Exception.

"The Witness: I didn't understand your Honor's question before.

"The Court: Then I'm sorry. I didn't make it clear, apparently.

"Now it is clear to you.

"The Witness: Yes.

"The Court: How much?

"The Witness: At that point I owned one hundred—I believe approximately one hundred fifty shares of stock.

"The Court: How much in dollars?

"The Witness: It wasn't dollars.

"Mr. Scotti: May I—

"The Court: Proceed, yes, Mr. Scotti, proceed.

"By Mr. Scotti:

"Q. Mr. Ungar, will you look at me, please.

"A. Yes.

"Q. You had entered into a contract on behalf of the [fol. 102] Garep Realty Corporation originally with the owners of 299 Broadway to purchase that property for two million fifty thousand dollars; is that correct?

"A. That's what the contract says, yes.

"Q. You have no recollection about that?

"A. No, no independent recollection.

"Q. I see. But if the contract says that it's correct.

"A. That's right.

"Q. Now when you, on behalf of the S. J. Ungar Affiliates, in January 1958, conveyed title to this property to the Duanebroad Corporation, the syndicate, you conveyed it for two million two hundred thousand dollars; is that correct?

"A. I assume it is. I haven't got the figures in front of me.

"Q. You have no figures? You don't know whether you sold it for two million two hundred thousand dollars.

"A. No, I don't have the figures in front of me at this point.

"I would like to explain the matter, which I think could simplify it very quickly.

"The Court: No, no, no, Mr. Ungar. Please don't volunteer statements like that.

"As I indicated to you before, we have lawyers who conduct litigation. They have a right to phrase questions. It is not for you to volunteer anything. If you want to explain, or if the question is not satisfactory to you, that's none of your business.

[fol. 103] "Now, please, keep that in mind, will you.

"Repeat the question, Mr. Reporter.

"Mr. Scotti: Will you read the question, please.

"(Whereupon, the last question was read by the Court Stenographer, as follows: 'You don't know whether you sold it for two million two hundred thousand dollars?')

"A. At this time, no, I don't remember—

"The Court: Period, no. You don't know.
"Next question."

After an observation by the defense attorney for Mr. Jack, the defendant, as to a corporate name involved in the case on trial, the following transpired in open court in the presence of the jury:

(8)

(Trial Min. pp. 441-444)

"Q. Now, Mr. Ungar, do you recall last time testifying at the last trial?

"A. I do.

"Q. Do you recall my putting this question to you at the trial, and your making this answer—

"Q. (continuing)—Q. Now let's skip all the intermediate transactions which you described a little while ago. So that on January 20, 1958 the corporation, which you controlled and which paid two million fifty thousand dollars for this property, sold it to the Duane-Broad Corporation for what—\$2,200,000; am I correct?

[fol. 104] "A. I believe that is so, yes. I believe that is so."

"Do you recall giving that testimony at the last trial?

"A. I don't recall it, but if it's there I said it.

"Q. Isn't it a fact that you made a profit of \$150,000 in that transaction?

"A. I did not.

"Q. Well, wasn't there—what was the difference between— Or, rather—withdraw the question.

"Wasn't the difference between the purchase price or the price paid by the S. J. Ungar Affiliates, Inc., which was \$2,050,000, and the price paid by the Duane-Broad Corporation \$2,200,000,— What is the difference?

"A. \$150,000.

"Q. Who received that \$150,000?

"The Witness: Who received it?

"A. It was never received.

"Mr. Scotti: I don't mean physically, Mr. Ungar. You're a lawyer. You understand me.

"The Witness: I've answered the question. It was never received.

"Q. Well, what happened to the \$150,000? You tell us in your own words.

"A. That is the value of the stock which was placed on what is known as a tax-free transaction, an exchange of a contract for stock—

"Mr. Scotti: Correct.

"A. (Continuing) —and I never received the one hundred fifty thousand because that one hundred fifty shares of stock were not sold at that time. Subsequently, I sold [fol. 105] fifty-five shares of it, and I got in fifty thousand dollars.

"Mr. Scotti: You made your point.

"Mr. Baker: Oh, I don't think it's a point. He's answering a question that he asked him.

"The Court: Yes, all right. Strike it out. He has answered it.

"Next question.

"Q. Mr. Ungar, is it a fact that you obtained a stock interest in the Duane-Broad Corporation to the extent of \$150,000, which was the difference between the purchase price and the selling price?

"A. No.

"Q. You deny that?

"A. I absolutely deny that I received \$150,000.

"Q. That is not the question.

"A. That was your question.

"The Court: No, it was not, Mr. Ungar.

"Mr. Scotti: Read it, Mr. Reporter.

"(The question was repeated by the Court Stenographer as follows: 'Q. Mr. Ungar, is it a fact that you obtained a stock interest in the Duane-Broad Corporation to the extent of \$150,000, which was the difference between the purchase price and the selling price?')

"Q. You still deny that?

"A. I absolutely deny it without any question about it. May I continue?

"The Court: No."

After further testimony by the respondent, the following took place between the Court and the respondent in open court in the presence of the jury:

[fol. 106] (9)

(Trial Min. pp. 480-461)

"The Court: Then, strike it out. Resume your testimony.

"Q. Let us keep our eye on the main, basic question here: What was the conversation you had with respect to the remodeling of his apartment?

"A. I am not separating it because it was all part of a group of conversations.

"The Court: Nobody is asking you to separate it, Mr. Ungar, insofar as the conversation is concerned. However, you are being asked to separate conversation from impressions and opinions and nothing else. That is not part of the substance of the conversation. Do you understand that distinction?

"The Witness: I do, your Honor.

"The Court: Very well."

The respondent, after having been asked further questions by the People, covering five and one half pages of transcribed testimony, testified as follows in open court in the presence of the jury:

(10)

(Trial Min. p. 467)

"Q. Let's forget about how you got there. Isn't it a fact that when you ordered Mr. Bechtel to do this remodeling job you told Mr. Bechtel that you were doing this because Mr. Jack was a good friend of yours and could do favors [fol. 107] for you?

"A. I testified—if you are asking me my recollections now—

"The Court: No.

"Mr. Scotti: Read back the question, please, Mr. Reporter.

"The Court: Just a minute, Mr. Scotti, please. Just listen to the question, Mr. Witness. Read it Mr. Reporter.

"(The question was repeated as follows by the Official Stenographer: 'Q. Let's forget about how you got there. Isn't it a fact that when you ordered Mr. Bechtel to do this remodeling job you told Mr. Bechtel that you were doing this because Mr. Jack was a good friend of yours and could do favors for you?')

"The Court: Do you understand that question?

"The Witness: I do. The answer is No.

"The Court: Next question.

After further testimony by the respondent, covering a page and a half, the following transpired in open court in the presence of the jury:

(11)

(Trial Min. 469-477)

"Now, page 619, do you remember this question being read to you:

"Q. Well, now, did you ever tell Mr. Bechtel that Mr. Jack was a dear friend of yours and that he was in politics and probably could do favors for you?

"A. If that's what the Grand Jury minutes said that I said, then I said it, and I probably told him at the time, yes. I don't—

[fol. 108] "Q. And that was true?

"A. Yes."

"Do you recall giving that testimony at the last trial?

"A. Mr. Scotti—

"The Court: No. The question is, do you recall giving that testimony at the last trial.

"The Witness: Not as it was read.

"The Court: Next question.

"Q. Well, do you deny having said that the answer you gave before the Grand Jury was true, namely, that you told Mr. Bechtel that Mr. Jack was a dear friend of yours and

that he was in politics and probably could do favors for you?

"The Witness: Will you read that question?"

"Mr. Scotti: Read it back to him."

"(Whereupon, the last question was read by the Court Stenographer, as above recorded.)"

"A. I deny having—

"The Court: Period. That's all that question calls for; either yes or no.

"Next question.

"Mr. Scotti: I don't understand this.

"Q. Do you deny giving this testimony at the last trial?"

"Mr. Baker: He's answered it, if the Court pleases.

"The Court: I will permit the question to be stated again, Mr. Baker. Your objection is overruled, with an exception to the defendant.

"Repeat that, Mr. Reporter."

"(Whereupon, the last question was read by the Court Stenographer, as above recorded.)"

[fol. 109] "The Witness: May I answer it, your Honor?"

"The Court: You may answer it yes or no.

"The Witness: I can't answer the question yes or no.

"The Court: Period. Next question. He says he can't answer it.

"Q. Do you deny having said before the jury, the last trial, in answer to the question, 'And that was true? 'Yes.' Do you deny having made that answer 'Yes'?"

"A. I do not deny having answered that question 'Yes.'"

"Now I ask you again: Was it true, was your answer true before the grand jury, that you said that Mr. Jack was a dear friend of yours, that he was in politics and probably could do favors for you?"

"The Witness: Was that true?"

"The Court: No.

"Mr. Scotti: That answer you gave before the grand jury.

"The Court: My dear man,—

"(To the jury) Will the jury please retire to the jury room.

"Do not discuss this case, and do not form or express any opinion as to the guilt or innocence of this defendant.

"(Whereupon, at 12:18 p.m., the members of the jury retired from the courtroom, and the following proceedings took place on the record in open court:)

"The Court: Now will counsel and the witness and the reporter please retire to the Judge's Robing Room.

[fol. 110] "(Whereupon, the following proceedings took place on the record in the Judge's Robing Room, in the presence of counsel for both sides, but out of the presence or hearing of the defendant and the members of the jury:)

"The Court: Now, Mr. Witness, this case was tried once before and took considerable time. You were a witness for many days. A number of incidents occurred in that trial which, in my judgment, directly tended to interrupt the proceedings of the Court and to impair the respect due to the authority of the Court, and you were the one who created those incidents, in my judgment.

"I told you then, at the first trial, that you were creating a very serious problem for the Court and that, as a lawyer, I assumed you knew what the problem was.

"I should like very much to avoid any repetition of what happened the last time.

"We each have a function to perform here. Whether it is an agreeable function or a disagreeable function is of no concern.

"Now I have said to you up to now on a number of occasions that you should confine your answers to the questions, not to volunteer, not to get into any dispute or discussions, not to try to indicate what you think the question should be or how you should answer it.

"This is a trial before the jury, not before the Court alone. As a judge, I must rule in accordance with my understanding of the law, which I am doing.

[fol. 111] "I hope you understand what I am saying, Mr. Ungar. Do you?

"The Witness: Well, I would like to say a word, if I may.

"The Court: No.

"The Witness: I can't understand what your Honor is saying.

"The Court: Then if you can't understand—

"The Witness: I understand what your Honor is saying—

"The Court: I don't want anything further, Mr. Ungar. All I want to add to what I have said, since you said you do not understand what I am saying—

"The Witness: I understand what your Honor is saying.

"The Court: You said you didn't.

"The Witness: But I cannot understand it in a vacuum; that's what I am trying to say, your Honor.

"The Court: Don't argue with me, Mr. Ungar.

"The Witness: I have got to understand the question, in order to answer it. I can't answer a question merely if your Honor says, 'Answer it,' if it doesn't make sense to me or if it's creating a false impression—

"The Court: Will you desist. You see, it's none of your business whether it creates in your judgment a false impression or not. The defendant is represented here by a lawyer, and the People are represented by a lawyer. It is for them to conduct this litigation; and not you.
[fol. 112] "Now I am only going to make one more statement and we will return to the courtroom.

"There is a rule of law that every man is presumed to intend the natural consequences of his act. I am going to hold you to that standard. And whether you tell me that you understand what I said or not will not be the test that I shall use in whatever action I propose to take.

"Not only should you, as a man and a citizen, be held to intend the natural consequences of your act, but you as a lawyer should be held to a higher standard of knowing that you are responsible for the natural consequences of your act.

"Also, there is a rule that every citizen is presumed to know the law. I take it that every citizen does not know the rules of the law of evidence. But as a lawyer, you certainly know the rules of law of evidence.

"Let's return to the courtroom.

"The Witness: I think I have a right, if your Honor please—

"The Court: I shall not—

"The Witness: —to have a statement made.

"Your Honor has made a statement which is intimidating. Your Honor has made a statement which is coercive, and I think I have a right to make a statement.

"Now if your Honor intends to take action against me, I submit that the action should be taken here and now. But I insist upon a right, and think that I am justified as a witness to make a statement before your Honor takes any action.

"I have a right to understand any question that's propounded to me, and I have a right, if a question is framed in such a way which creates a reflection upon me and which is not a fact—I have a right—

"The Court: Keep your voice down, Mr. Ungar. I kept my voice down.

"The Witness: I'm sorry, I apologize.

"The Court: And stop doing that. Don't raise your voice. And you have said enough. I have your point.

"Now the Court is not intimidating you. It is not coercing you, and it is not threatening you.

"The Witness: I disagree with your Honor.

"The Court: I didn't ask you whether you disagreed.

"And I suggest to you, Mr. Ungar, that you speak when you are asked to speak, from now on—please.

"Now the purpose of calling you in here was not to intimidate you or coerce you in the slightest. But the purpose is to avoid a repetition in the courtroom of the unseemly performance of the last trial, which I shall not tolerate.

"Now let's return to the courtroom.

"The Witness: I believe I have tried—

"The Court: I told you to speak when you were asked to speak.

"The Witness: Have I a right—

"The Court: No.

[fol. 114] "The Witness: Have I a right to understand questions?

"The Court: Let's return to the Courtroom.

"The Witness: I am asking the Court if I have a right to ask the question—"

The Court then resumed the trial on the record in open court in the presence of the jury, after which the following immediately took place:

(12)

(Trial Min. pp. 481-485)

"Mr. Scotti: May I have the previous question and answer read back?

"The Court: Yes.

"(Whereupon, the last question was read by the Court Stenographer, as follows:)

'Now I ask you again: Was it true, was your answer true before the grand jury, that you said that Mr. Jack was a dear friend of yours, that he was in politics and probably could do favors for you?

"Mr. Scotti: May I have an answer to that question.

"A. I can't answer that question.

"Q. You can't answer that question? You can't say whether it's true or not?

"A. I can't answer that question.

"Q. You appreciate, Mr. Ungar, you have been called as a witness and you are asked to respond to questions?

"A. I do.

"Q. Is the question unclear to you?

"A. It is.

[fol. 115] "Q. Very well, I will rephrase it. Did you say, before the grand jury, or interpose the answer, 'Yes,' before the grand jury, to the question, as follows: 'Well now, did you ever tell Mr. Bechtel that Mr. Jack was a dear friend of yours, and that he was in politics and probably could do favors for you?'

"A. I don't remember.

"Q: You recall, Mr. Ungar, your testifying at the last trial.

"A. I do.

"Q. Do you recall my putting this question to you at the last trial, as follows: 'Well now, did you ever tell Mr. Bechtel that Mr. Jack was a dear friend of yours and that he was in politics and probably could do favors for you?'

Do you recall my putting that question to you, in substance?

"A. I do not recall it in exactly that way, no.

"Q. Do you deny that question was put to you?

"A. I neither deny or affirm. I have no recollection of it.

"Q. Do you recall your making this answer in court: 'If that's what the grand jury minutes said that I said, then I said it, and I probably told them at the time, yes'. Do you deny making that answer?

"The Witness: I don't understand the way you read that.

"Mr. Scotti: Read it back to him.

"(Whereupon, the last question was read by the Court Stenographer, as above recorded.)

"Q. Do you deny making that answer in court at the last trial?

"A. No, I do not deny making that answer.

[fol. 116] "Q. Was that answer true?

"A. I don't know exactly what it referred to.

"Mr. Scotti: Your Honor, I respectfully request that this witness be directed to answer the question.

"The Court: The witness is directed to answer the question.

"The Witness: Which question, your Honor?

"Mr. Scotti: Read back the question, Mr. Reporter.

"(Whereupon, the question was read by the Court Stenographer, as follows: 'Was that answer true?')

"The Witness: I don't know at this time what question you're talking about, I'm sorry. Was what answer true?

"Mr. Scotti: I will reread it, the fifth time.

"Q. 'Answer: If that's what the grand jury minutes said that I said, then I said it and I probably told them at the time, yes.' Was that answer true?

"A. The testimony I gave at the last trial was true, yes.

"Q. And is it still true today?

"A. As to what I intended to say, yes.

"Mr. Scotti: Your Honor, I respectfully request that you direct this witness to respond to the question.

"The Court: The answer of the witness is stricken from the record, and the jury is instructed to disregard it.

"And you, Mr. Witness, are directed to respond to the question as put.

"Will you read it, Mr. Reporter.

[fol. 117] "(Whereupon, the question was read by the Court Stenographer, as follows: 'And is it still true today?')

"Mr. Scotti: That's the question.

"A. I can't answer the question.

"Q. Was it true last time before a jury, a court and jury in this courtroom?

"A. It was true, if it said what I intended it to say.

"Mr. Scotti: Now, your Honor, I respectfully request that you admonish this witness to respond to the question.

The Court: (To the jury) Ladies and gentlemen of the jury, that answer is stricken out as not being responsive. Disregard it.

"And you, Mr. Witness, are instructed to respond to the question.

"Will you read it, Mr. Reporter.

"(Whereupon, the last question was read by the Court Stenographer, as above recorded.)

"The Witness: I can't answer that question.

"Q. When you testified before the Court and jury last time that that answer was true, were you telling the truth?

"A. I was telling the truth.

"Q. And is that still the truth?

"A. It is still the truth.

After further questioning of the respondent by the People, covering five and one half pages of transcribed testimony, the following testimony was given by the respondent in open court in the presence of the jury:

[fol. 118]

(13)

(Trial Min. pp. 490-491)

"Q. All right. So that it is true that you did say that you might have said to Bechtel that 'if it became a matter of

public information that I was paying for this, that it would be embarrassing to him. I mean I can't answer the exact language that I might have used but that's possible I said something like that.' Do you remember saying that?

"A. That's not the question you asked me before, though.

"The Court: Strike out that answer. Read the question, Mr. Reporter.

"Q. You are saying—

"The Court: Just a minute, Mr. Scotti. Maybe I am not keeping my voice up.

"Strike the last answer.

"Read the question.

"(Whereupon the next to the last question was read by the Court Stenographer, as above recorded.)

"Q. In other words, you admit—

"The Court: Let him answer.

"Mr. Scotti: I'm sorry, your Honor. He is nodding his head affirmatively.

"The Court: It doesn't do me a bit of good. I am not looking at the witness. I want to hear the answer.

"(To the witness) What is the answer?

"A. Yes.

"Q. So you admit that it would be embarrassing if it were publicly known that you were paying for the alterations.

"A. No—that Hulan thought it would be embarrassing. [fol. 119] "Q. He thought it would be embarrassing?

"A. Yes.

NOVEMBER 25, 1960

Further, on November 25, 1960, the respondent again appearing as a witness in said trial, testified in open court in the presence of the jury and—

On said November 25, 1960, the respondent, as a witness in said trial committed a wilful contempt of court during the sitting of the Court, and in its immediate view and presence, in that he wilfully and in a repeated effort, obvious to the Court, to disrupt the orderly trial of the case

therein, culminated his contemptuous conduct by shouting in a loud, angry, disorderly, contemptuous, and insolent tone directly tending to interrupt the proceedings of the Court and to impair the respect due to the authority of the Court:

"I am absolutely unfit to testify because of your Honor's attitude and conduct towards me. I am being coerced and intimidated and badgered. The Court is suppressing the evidence."

ENTER:

JOSEPH A. SARAFITE

Joseph A. Sarafite
Judge, Court of General Sessions

Dated: December 8, 1960

[fol. 120]

COURT OF GENERAL SESSIONS
OF THE CITY OF NEW YORK

Dec. 8, 1960

I CERTIFY that the annexed is a copy of an Order to Show Cause now on file in the Clerk's Office, and that the same has been compared by me with the original and is a correct transcript therefrom, and of the whole of said original.

(SEAL)

WILLIAM DUZZIN,
Clerk of Court.

[fol. 121]

EXHIBIT 7 TO PETITION**EXCERPTS FROM PROCEEDINGS OF NOVEMBER 25
AND 28, 1960 IN TRIAL OF HULAN E. JACK****Proceedings of November 25, 1960**

Q. Now you appreciate, do you not, Mr. Ungar, that while you received immunity from prosecution for whatever crimes you might have disclosed in the course of your testimony, you do not receive immunity from any disbarment proceeding that may be instituted against you.

Mr. Baker: Now that's objected to, if the Court please.

The Court: Overruled.

Mr. Baker: Exception.

A. I do.

Q. Is that correct, sir? What's that?

A. I said I do.

Proceedings of November 28, 1960

Q. And, of course, when Mr. Baker tells you that you had complete protection when you invoked your privilege, you as an attorney were mindful of the fact that the granting of immunity by the grand jury to you did not immunize you from any disbarment proceedings, should any be instituted?

Mr. Baker: That's objected to. That's not a crime.

The Court: Overruled.

Mr. Baker: Exception.

Q. You asked me that question on Friday, and I said I know it.

[fol. 122]

EXHIBIT 8 TO PETITION

STENOGRAPHER'S MINUTES OF CONTEMPT HEARING
COURT OF GENERAL SESSIONS

COUNTY OF NEW YORK

PART VI

(November 1960 Term Continued
Held in Part II Courtroom)

[SAME TITLE]

New York, N. Y.
December 13, 1960
10:15 a.m.

Before—HON. JOSEPH A. SARAFITE, J.

APPEARANCES:

For the Respondent: Harry Zeitlan, Esq.,
By Frank Dutka, Esq., of counsel.

The Clerk of the Court: Youth Part is now recessed.
Part 6, November 1960 Term continued is reconvened.
In the Matter of the Criminal Contempt of Sidney J. Ungar.
Sidney J. Ungar, to the bar.

(The respondent was duly arraigned at the bar.)

The Clerk of the Court: Are you Sidney J. Ungar, sir?

The Respondent: Yes.

The Clerk of the Court: Do you have a lawyer?

The Respondent: Yes, sir.

[fol. 123] The Clerk of the Court: Will you file a notice
of appearance, Counsel.

Mr. Dutka: I will.

The Clerk of the Court: And make your appearance
known on the record.

Mr. Dutka: Harry Zeitlan.

I have an application, your Honor (handing document
to the Court).

The Court: You are applying for an adjournment on various grounds, stated in an affidavit, sworn to by you, and your application is that this proceeding be adjourned until the 25th day of January 1961.

On what date were you retained?

Mr. Dutka: Well, Mr. Zeitlan was retained—

The Court: Aren't you Mr. Zeitlan?

Mr. Dutka: No, he is not in court, your Honor.

The Court: You were asked your name, sir. What is your name?

Mr. Dutka: Dutka, D-u-t-k-a.

The Court: And your first name?

Mr. Dutka: Frank.

The Court: When was Mr. Zeitlan retained in this case?

Mr. Dutka: I don't know the exact date, your Honor. It was recently, though.

The Court: What's that?

Mr. Dutka: I don't know the exact date. It was within the past few days, your Honor.

The Court: Eighteen days ago, on November 25, 1960, in the course of the trial of the indictment against Hulan E. Jack, while this respondent was a witness on the stand, the Court expressed the opinion that he was contemptuous, disorderly and insolent.

[fol. 124] According to the provisions of the Judiciary Law, where the offense is committed in the immediate view and presence of the Court, it may be punished summarily.

The only reason that the Court did not take such action on November 25th was to avoid any incident of any nature that might have influenced the jury and thereby possibly diminished the rights of the defendant to a fair trial.

Having deferred action on the conduct of the witness until the completion of the Jack trial, this Court went beyond the requirements of the Judiciary Law and took the trouble to prepare written charges against this respondent and to serve them upon him five days before the date set for the hearing, which is today.

So that it is quite obvious that, Number 1, the Court could have acted summarily, without setting this hearing and. Number 2, the respondent had full and adequate notice that a proceeding would be taken on his conduct as a witness.

To come in now, after eighteen days' notice and request an adjournment to January 21st has very little effect with me.

The application is denied.

Mr. Dutka: Your Honor, would you adjourn this until Mr. Zeitlan has completed his trial?

The Court: No, I will not. The respondent had adequate notice. He should not have picked a lawyer who was engaged in a trial. There are many lawyers in this City of New York.

Are you ready to proceed, sir?

Mr. Dutka: Excuse me for a minute, your Honor.

The Court: I take it, Mr. Dutka, that you are a lawyer.
[fol. 125] Mr. Dutka: Yes, your Honor.

The Court: Yes, of course.

Mr. Dutka: Your Honor, could I be permitted time to bring somebody here?

The Court: How much time do you wish?

Mr. Dutka: About a half-hour or an hour, your Honor.

The Court: Mr. Dutka, I shall give you the maximum time you have asked for. I will give you an hour and ten minutes. It is now 10:20. I shall mark this for 11:30.

Mr. Dutka: All right, thank you, your Honor.

(Whereupon, a recess was taken until 11:30 a.m.)

AFTER RECESS

(11:30 a.m.)

The Clerk of the Court: Part 6, November 1960 Term continued, is reconvened. Second call.

In the matter of the criminal contempt of Sidney J. Ungar.

(The respondent and his counsel, Mr. Dutka, are present.)

Mr. Dutka: Your Honor—

The Court: Yes, Mr. Dutka?

Mr. Dutka: I went to Part 7 in Supreme, New York, where Mr. Zeitlan is on trial, and I requested that he appear here.

He made an application to Judge Klein. He was in the middle of examining a witness. And Judge Klein will grant a recess at 12:15, and would your Honor continue this until then. Mr. Zeitlan will appear.

[fol. 126] The Court: Yes, I wish to express my thanks to Mr. Justice Klein. 12:15.

Mr. Dutka: Thank you, Judge.

(Whereupon, a recess was taken until 12:15 p.m.)

The Clerk of the Court: Part 6, November 1960 Term continued, is reconvened in the matter of the criminal contempt of Sidney J. Ungar.

Sidney J. Ungar to the bar.

(The respondent was duly arraigned at the bar, and his counsel, Mr. Zeitlan, was present.)

The Clerk of the Court: Will counsel please note his appearance on the record.

Mr. Zeitlan: May I identify myself, your Honor.

My name is Harry Zeitlan, and I am an attorney. My office is at No. 350 Broadway.

Would it be possible, if the Court pleases, that I confer with the Court in private concerning this matter? Would that be possible, sir?

The Court: Yes.

Mr. Zeitlan: May we do that, your Honor?

The Court: Yes, step up.

(Whereupon, there was a conference at the bench, off the record and out of the hearing of the respondent between the Court and Mr. Zeitlan, counsel for the respondent, after which the following took place on the record in open court.

The Court: We will take a ten-minute recess.

(Whereupon, a brief recess was taken.)

The Clerk of the Court: Hearing continued in the matter of the criminal contempt of Sidney J. Ungar.

Sidney J. Ungar and counsel are both present.

Mr. Zeitlan: If your Honor pleases, on Saturday [fol. 127] afternoon, for the very first time, I was re-

quested by the respondent, Mr. Sidney J. Ungar, to represent him in these proceedings that have been instituted against him.

The only conversation that I had with Mr. Ungar was over the telephone, he having called me at my home, both on Saturday and on Sunday.

When he asked me to represent him, if the Court pleases, I first asked Mr. Ungar when this matter was to be heard, and he told me that it was to be heard the ensuing Tuesday, meaning today.

I thereupon told him that it would be absolutely impossible for me, under those circumstances, to prepare myself or to represent him because at that very time I was actually engaged in the trial of an action before Mr. Justice Arthur Klein in the Supreme Court in New York County.

I told Mr. Ungar that unless he could obtain an adjournment of these proceedings so as to enable me to familiarize myself with the charges with which he was being confronted, and so as to enable me to research the law and to see where, if at all, his legal rights are being impeded or impaired, if he could get me such an adjournment I told Mr. Ungar that then I would be willing to undertake his defense.

Now I have taken the liberty, as your Honor knows, to submit to our Honor an affidavit of actual engagement, which your Honor presently has before your Honor on the bench.

And I am here now because I explained the situation to Mr. Justice Arthur Klein in the Supreme Court, and he was kind enough to afford me this opportunity, between [fol. 128] now and two o'clock, when the Supreme Court reconvenes, to appear before your Honor and to personally state my position.

My position, therefore, is this: Unless your Honor is able to grant an adjournment of sufficient time to enable me to familiarize myself with the charges and to enable me to properly represent Mr. Ungar, I will not be able to represent him.

And on his behalf, and in the interest of justice, I most respectfully ask that your Honor do grant this adjourn-

ment so that I might be afforded an opportunity to prepare and to properly represent my client as a lawyer.

Now I plead with your Honor and I implore your Honor, under the circumstances, to be kind enough to adjourn this matter for such time as your Honor may deem fit, so that in the interim I may take whatever steps I think your Honor would want me to take in defense of my client and of his position.

I might say, parenthetically, that from my conversations with Mr. Ungar, he has assured me, or I would not have taken up his defense, that he never meant to offend the Court, that he never meant to be contemptuous of the Court, that whatever he said he said in the heat of a trial and if it has offended anyone that he deeply regrets it, and I think that he has been sincere with me in making that statement. And because he has made that statement to me, if the Court pleases, I should like to represent him and to see whether or not there is any justice or merit in his position.

And so, in the face of that, I most respectfully ask your Honor to grant us a single week's adjournment so that [fol. 129] in that interval of time I may be enabled to take whatever steps may be necessary in protection of my client's interests.

Thank you for listening, your Honor.

The Court: Don't thank me for listening. That's my job.

Mr. Zeitlan: All right, sir.

The Court: And I sympathize with your position because you have a job, just as I have a job.

This man has had three weeks' notice of this proceeding. He took the stand in the second trial on November 22nd and from the very outset conducted himself in a manner similar to his conduct in the first trial, where ample notice was given to him that the conduct created a serious problem for the Court and that he, being a lawyer, certainly was aware of the fact that the Court was referring to contemptuous conduct.

It was only out of a deep consideration for the rights of a defendant that this man was not adjudged and punished for contempt on November 25, 1960. When in the presence

and view of the Court he committed the acts set forth in the order to show cause.

I did not want to take any action during the trial, at any time, which would in the slightest degree even tend to diminish the rights of a defendant to a fair trial.

I feared that if I took action against this witness, it could be possible that that action would unduly influence a juror. So action was deferred until the completion of that trial.

Now there was no mystery about what the Court had in its mind because, in addition to telling the witness that in my opinion he was contemptuous, disorderly and insolent, I also made it clear to him that action would be taken and to hold himself ready for it.

Now I am sure that you are familiar with the types of contempts set forth in the Judiciary Law and the distinction between a summary contempt and one that is not.

It is clear that on a summary contempt there need be no hearing, no trial, and that the Judge may act immediately.

Not having done so, I decided to go beyond the rights that the respondent had and to adopt the procedure of a proceeding for contempt where the offense was not committed in the presence of the Court. That was implicit in the fact that I went to the trouble of preparing written charges at great length and serving them on the respondent five days in advance so that he would have all the opportunity that could possibly be afforded him to show cause, to show any excuse, justification or extenuation, as to why he should not be adjudged in contempt and punished for it.

I think this witness also must know, from his attendance at the first trial, where he was a witness for six days, and his attendance at the second trial, that as a matter of practice this Court dislikes unnecessary delay in the administration of our courts.

Consequently, to come in now at this late day, with a lawyer who was actually on trial at the time he consulted him, and assume that that would be taken as an adequate ground for an adjournment, leaves me in somewhat of a quandary.

You asked me to be kind. I certainly should be unhappy to think that I am an unkind person. But I sit here not [fol. 131] as an individual. I sit here as a representative of

a revered institution, a court, for which my respect is unbounded.

I think I must be kind to the administration of justice. I see no merit whatsoever to this application. And obviously, that conclusion does not in any way reflect upon you as a lawyer; if you say, and I can understand it, that you know nothing about this case except what you learned on Saturday, and this is Tuesday.

The application for an adjournment is denied.

Mr. Zeitlan: Well, under the circumstances, then, will your Honor permit me to withdraw, since I am not prepared to proceed in this matter?

The Court: I honor your statement and grant your request.

Mr. Zeitlan: Thank you, your Honor.

(Whereupon, Mr. Zeitlan left the Courtroom.)

The Court: Now let's proceed.

In this proceeding, in the Matter of the Criminal Contempt of Sidney J. Ungar, I direct the Clerk to mark in evidence as one exhibit the following papers referred to on Page 3 of the order to show cause, to wit, a letter dated November 15, 1960, from the respondent, addressed to the Court, with two enclosures, being copies of two other letters, one dated September 29, 1960 and the other October 4, 1960, together with the envelope in which these documents came.

Please mark that.

The Clerk of the Court: Court's Exhibit No. 1, your Honor.

(Whereupon, the documents above referred to were marked Court's Exhibit 1 in evidence)

[fol. 132] The Court: I direct the Clerk to mark, as Court's Exhibit No. 2, the minutes of the testimony of the respondent in the first trial of the indictment in the case of the People of the State of New York v. Hulan E. Jack, which was tried from June 9, 1960 to July 6, 1960.

That will be deemed marked Court's Exhibit 2 in evidence.

(Whereupon, the minutes above referred to were deemed marked Court's Exhibit 2 in Evidence)

The Court: Next I direct the Clerk of the Court to deem marked the minutes of the testimony of the respondent in the second trial of the People of the State of New York against Hulan E. Jack, which was conducted from November 15, 1960 to December 6, 1960.

(Whereupon, the minutes above referred to were deemed marked Court's Exhibit 3 in Evidence)

The Court: Now that completes the proceedings so far as the Court is concerned.

Now, Sidney J. Ungar, I call upon you to show cause why you should not be adjudged in contempt of court and punished for said contempt.

The Respondent: If the Court please, I do not wish to make any statement which would in any way indicate that I am participating in the evidence that the Court has offered into evidence at this alleged hearing.

I do, however, respectfully ask leave to make a statement to the Court about certain observations that it made to Mr. Zeitlan in response to a denial of his request for an adjournment.

The Court: I shall hear you.

The Respondent: Thank you, your Honor.

[fol. 133] It is true that this Court had the authority to adjudge me in contempt on November the 25th, but it did not.

I respectfully state that I do not believe, and I state this most respectfully, that the reason that the Court at this time assigns for not taking any such action has legal validity, because this Court could have adjudicated me in contempt privately in chambers and deferred punishment of any such contempt until after the trial, with a direction to me not to make any public statement about the adjudication, and this would not have in any way affected the rights of the defendant Hulan Jack in the trial.

When the Court failed to adjudge me summarily in contempt and excused me as a witness, I submit that it had no power to recall me after the conclusion of the trial, except on papers. And these are the papers, I submit, which the District Attorney's office of New York County prepared and served on me at 5:00 p.m. on December the 8th.

The Court: Let me correct you. I don't like to interrupt.

Those papers were prepared and signed by the Court, and it is of no consequence as to who typed them or who gave any aid or assistance to a Court that was a very busy one after the completion of the Jack trial.

Proceed.

The Respondent: Might I respectfully state, if your Honor please, that I have a recorded conversation that I had with Mr. Clark of the District Attorney's office on the date that these papers were served, in which Mr. Clark advised us that he was the person who not only had prepared these papers but that he had spent the entire weekend going over the record in order to prepare them.

The Court: Let's not get into a side issue. You have made your point.

Proceed.

The Respondent: I respectfully submit, if the Court please, that the participation by the District Attorney's office in this proceeding was illegal and improper.

I respectfully—

The Court: It was done by my request, Mr. Ungar.

The Respondent: Might I respectfully state to the Court that the administration of justice in a free society requires that the Judiciary must be independent of a prosecutor's office.

Furthermore, I respectfully state to the Court that the specifications which the Court set forth in the order to show cause charges me with acts which are wholly outside of the Judiciary Law and completely are acts which do not constitute, by any definition of 750 or any other section of the Judiciary Law, acts that are contempt of Court.

And I am not prepared at this point to identify them, but there is no question in my mind that the petition or, rather, the order to show cause has allegations in it which are wholly outside the scope of the Judiciary Law.

It was for this reason, after a discussion with Mr. Zeitlan, as counsel, that we intended to ask the Court—we asked the Court for the adjournment, as Mr. Zeitlan's affidavit states, to test the validity of this entire proceeding before the Appellate Division and, if necessary, the Court [fol. 135] of Appeals, because I respectfully submit that I

am before this Court on an improper proceeding and that this Court had no authority over me except on a proper proceeding.

Furthermore, I respectfully submit that if this citation and order to show cause are valid, and this Court ordered me, as it stated a few minutes ago, to show cause why I should not be punished for contempt, and that this was not intended to be a summary disposition, as the Court stated, I had a right to obtain counsel of my own choice. These papers were served on me only late Thursday afternoon, at almost 5:00 p.m. I spent part of Friday morning in Mr. Clark's office. Friday afternoon was the first opportunity I had to consult counsel. I obtained counsel, as he has already stated to the Court on Saturday.

I don't think that it is necessary to make any observation about what the inclement weather was on Sunday and yesterday, which prevented any preparation with counsel for the purpose of being ready today.

I made observation to counsel that there may be a problem in getting an adjournment, and it was his opinion that his actual engagement would be recognized by this Court so that he could complete the same and then we could then come before this Court for a hearing and present the evidence properly, the way it should be.

Might I respectfully state to the Court that since I have been brought here by this Court under an order to show cause, that under the case of *People v. Rotwein*, 291 N. Y. 116, before this Court, and I quote—and I have the case here, if your Honor cares to examine it, and this is the leading case, I believe, on the question of where a party [fol. 136] is brought before the Court under an order to show cause—before a Court could punish for contempt of court, it was bound to afford an opportunity to present evidence which would indicate good faith or which might furnish justification for this statement.

I respectfully submit that this is the opportunity that I have asked for and that counsel has asked for.

I respectfully submit that the Court has denied me this opportunity; that I have had no opportunity at all to prepare, to answer a thirty-page specification which was served upon me Thursday afternoon at 5:00 p.m.

I respectfully state to the Court that I did not have eighteen days' notice, as the Court states.

It is true that the Court several times indicated during the course of the trial that my action was contemptuous. But as I read the specifications which the Court signed and served upon me, I notice that none of these other accusations of contempt are included in the specifications. Only one statement, which appears on the last page of the specifications, refers to the only time that the Court made any reference to contempt. All the other references to contempt that are contained during the second trial the Court omitted from its specifications and, I respectfully submit, with good cause.

Now I finally, if your Honor please, state to this Court as follows: I believe that this proceeding, and the cases so state—every case dealing with criminal contempt states—is a penalty which should be used with caution so as to avoid judicial tyranny.

I respectfully state that this is in the nature of a proceeding which is criminal.

[fol. 137] I respectfully state to the Court that if it's in the nature of a criminal proceeding, a defendant is entitled to a reasonable opportunity to obtain counsel and secure and prepare a defense.

This is the first return date of this proceeding because this proceeding was only served upon me Thursday night at 5:00 p.m. I have not been given any opportunity, and I will be prepared to answer the Court's charges at a proper hearing, if the Court will give me such an opportunity, because I am satisfied in my mind and in my conscience that I can establish with adequate opportunity, that I did not commit any contempt of court.

I am satisfied in my own mind that I never intended to commit any contempt of court. I believe I can satisfy and prove that there was never any intent on my part to do any act which was contemptuous, disorderly or insolent.

I believe, in view of the fact that the Court is a party to this proceeding, that these basic rights are rights which any defendant (or in this case, as I am named a "respondent") is entitled to.

The administration of justice requires that a defendant be given justice and an opportunity to defend himself.

By your Honor's proceeding this morning, I have been denied this opportunity. There is no opportunity being given to me to defend myself, and I must therefore, if your Honor please, remain mute on the question of the evidence which the Court submits.

The statement that I have made is merely in response to the observations that the Court made when denying Mr. Zeitlan's application for an adjournment.

[fol. 138] And on the basis of this, if your Honor please, I once again personally now respectfully request an adjournment so that I can get adequately prepared to defend myself on the charges.

And I want to conclude with this observation, which Mr. Zeitlan made: that at no time was there any intent on my part to do or say anything to affront the dignity of this Court. There was no intent on my part at any time to in any event reflect upon the Court, and I feel that under these circumstances, and under the unusual circumstances that took place on the trial, an opportunity to prove these statements by competent medical proof, by competent expert testimony and otherwise should be afforded me.

The Court: Your application is denied. Have you anything else to say?

The Respondent: Your Honor, I cannot participate in the hearing, other than for the statements that I have made.

The Court: I take it, therefore, that you have nothing further to say. You may sit down.

Before announcing my decision on this proceeding, I should like to make some observations.

A Court clearly must have power to maintain order at a trial and to take steps to uphold such power.

In this proceeding the respondent is charged with contempt of court. This charge applies exclusively to his conduct as a witness in a judicial trial.

The present proceeding should not in any way be confused with the trial itself.

The object of the trial of Mr. Hulan E. Jack was to determine the guilt or innocence of a defendant accused of crime.

[fol. 139] The object of this proceeding is to determine the guilt or innocence of a witness accused of contempt.

The fact that Mr. Ungar participated in events which formed the basis of the indictment against Mr. Jack has no bearing on this proceeding, and I am giving weight to that fact.

A proceeding such as this could have arisen with regard to any witness who was contemptuous, regardless of his connection with the crime being tried, if any.

Now addressing myself to the question of respondent's guilt or innocence: At the outset let me say that if respondent's comments in court during the trial had occurred privately, between him and me, as individuals, I would have ignored them, with the scorn they deserved. But that is not the way it happened.

He was a sworn witness during the formal proceedings of a public trial. In the presence of a jury he attempted to, besmirch and sully the dignity of the Court. He did this by his conduct, not towards me as an individual but towards the Court as an institution. His conduct tended to degrade a solemn proceeding into a foul and noisome spectacle. Even if a Judge were inclined to ignore such conduct, he would be inflicting a grievous blow to the due administration of justice by doing so.

The next question is: What type of witness do we have here?

He is not an uneducated, an inexperienced person. Most witnesses are not familiar with the procedure in courts. This witness is a lawyer, who has tried cases before juries and examined witnesses himself. He knows the [fol. 140] rules of evidence and the respective provinces as a witness and of the Court. So we start with a man who is acutely aware of the limitations and responsibilities imposed upon a witness.

Beyond his general knowledge, he had overwhelming special knowledge of what was expected of him in this case. Before taking the stand in the second trial the witness had the experience of testifying in the first trial for six days. His pattern of conduct at the first trial brought frequent reminders and directions to him from the Court to obey its rulings. He paid little attention to them. He

presumed to be his own judge. He repeatedly shouted and gesticulated and generally acted in a most disorderly manner.

At the beginning of his testimony at the second trial it was apparent that the witness was embarking upon the same pattern he pursued at the first trial. His conduct was easily susceptible to the inference that he deliberately wanted to sabotage the case in any way possible and was attempting to provoke incidents that would lead to a mistrial. Such a result would have produced a profound miscarriage of justice and a most serious reflection on the administration of our courts.

To avoid any such result, the Court, in the privacy of its chambers and in the presence of both counsel at the trial, reminded the witness of what had happened at the first trial and pointed out to him the need to avoid a repetition.

Therefore, it cannot be said that this witness acted out of ignorance or mistake. In my judgment, his conduct was intentional, wilful and done with full knowledge. It was not trivial or slight but gross and offensive.

[fol. 141] Another element in this type of proceeding concerns the personality of the Judge. A Judge must be scrupulous to make certain that he himself does not offend the supremacy of the law by any abuse of the great power of his office. I am also mindful that a Judge should carefully avoid any action that may create the appearance, even though the fact be to the contrary, that he is unduly sensitive to fancied slights to his dignity. As much as a human being can do so, I believe that I have eliminated such feelings as considerations in this proceeding.

As to an apology: I should suppose that any Court should acknowledge it and consider it on a matter of this kind. Also, without going into the merits of any claim of illness being responsible for the conduct, I shall make allowances for the fact that, like most witnesses, this respondent, while on the stand, was laboring under a nervous strain. Making these allowances, however, does not excuse or justify the conduct. They should be weighed in extenuation on the question of punishment.

The maximum punishment for contempt of court is a fine of \$250 and thirty days in jail.

Weighing all of the elements alluded to, and giving full consideration to the extenuating circumstances urged by the respondent, I hereby find the defendant guilty, and I adjudge him to be in contempt of court.

The punishment which the Court orders is that Sidney J. Ungar, for the said criminal contempt of court, forthwith pay a fine of \$250 to the Clerk of the Court of General Sessions, and in default of the payment of said sum as a fine, he be committed to the civil jail in the County of [fol. 142] New York for thirty days. And, in addition, he is hereby directed to be imprisoned for a period of ten days in the civil jail of the County of New York, and the Sheriff is commanded to receive the said Sidney J. Ungar into custody and to detain him in the civil jail in the County of New York until the judgment of this Court is satisfied.

The Court takes a recess.

The Respondent: May I have one word, your Honor?

The Court: Oh, certainly.

The Respondent: I would like to state, for the record, that it is this specification, which the Court alluded to in its sentence, of attempted sabotage of the trial, which I say cannot, under the Judiciary Law, be used as the basis for any contempt.

If there is any basis whatsoever for the Court's observation, that I attempted to sabotage the trial, the charge against me should be a much more serious one, and I am prepared to stand trial for that, and just punishing me for contempt of court is not sufficient because then I am interfering with the administration of justice.

I would ask your Honor to proceed before another Court and be the petitioner and permit me to examine the Court as a witness to see whether or not the Court's statement has any justification.

As an officer of this Court, I deeply resent the Court's insinuation that I attempted to interfere with the administration of justice and sabotage the trial. I think the statement is a canard and unfair and unjust and indecent, and I deeply resent it.

I believe that this Court's remarks along these lines indicate clearly, in my opinion—

[fol. 143] The Court: I take it, from what you have said, that you are now citing the Court for contempt.

The Respondent: I say that the Court should be a petitioner in a proceeding against me, if the Court honestly believes that I have attempted to sabotage the trial. And if the Court is now punishing me for such an act, because that is not part of a criminal contempt, I submit, if the Court please, that those statements, in my opinion, establish the Court's prejudice, bias and hostility against me and disqualifies—

The Court: (To spectator) Don't leave this courtroom.

The Respondent: I'm sorry. Was your Honor addressing me?

The Court: No, not at all. I wasn't addressing you. I was merely trying to indicate that during a proceeding of this kind it is a little disorderly to permit movement around the court.

The Respondent: I'm sorry. I merely wanted to complete the statement that I believe that the Court's statements on sentence, to me, establish the Court's personal prejudice, bias and hostility against me. I feel that under these circumstances the Court should disqualify itself from sitting in this contempt, and I respectfully state that the Court should refer the entire proceeding to another court so that the matter can be determined dispassionately and objectively by a Court who has no personal interest, which I submit this Court has, and has exhibited by the remarks that it has made.

I finally ask, if the Court please, under these circumstances that I be granted a stay of execution until such time as I can make an application to the Appellate Division, [fol. 144] so that I may be in a position to have either bail or parole established by the Appellate Division with respect to the sentence imposed which requires me to be taken into custody.

The Court: Your application to transfer this proceeding to another Court is denied.

Your application for a stay is denied.

So that there will be no misunderstanding as to the nature of the contempt for which you stand convicted, I want the record to show that you are found guilty of criminal contempt of court committed on November 25, 1960 during the November 1960 Term continued, having committed the acts recited in the order to show cause which has been served upon you, and having shouted at the Court, "I am being coerced and intimidated: The Court is suppressing the evidence," while said Court was in session and in the immediate view, hearing and presence of the jury, by conduct which was willfully contemptuous and insolent and in a manner directly tending to interrupt the proceedings of the Court and to impair the authority due to it.

The Respondent: Then do I understand, if your Honor please, that that is the only specification which the Court is basing this on, not the observations?

If that constitutes the only specification, if your Honor please, then I respectfully ask to submit medical proof this afternoon at two o'clock from a doctor and a hospital to show that those remarks were made under emotional strain and stress and were incurred because of the Court's repeated refusal to grant me a recess and an opportunity [fol. 145] to leave the stand so that I felt that I was literally chained to the witness chair. And I think the record clearly indicates that there were at least three or four times before this remark was made in which I begged the Court repeatedly to please give me a recess because I was too upset and nervous to continue, in which I begged the Court and stated that I was shaking all over and I was unable to continue.

I am only a witness, your Honor; I'm not a defendant. I never heard of a case in which a witness is not given a recess when requested. I had testified for three days, and this was the first time that I had asked this Court for a recess, and before this there were hundreds of pages of testimony by the District Attorney in examination in which I answered the questions fully. And apparently the result of the trial indicates that I did not do anything to sabotage the trial.

So I submit, if the only one for which I am being adjudged is the one which the Court has just stated, that I

am certainly entitled, and I will submit medical proof today to show that this was an involuntary statement made by me caused by the tremendous pressures that I was under and caused by the circumstances that occurred at the time of the trial.

The Court: Application is denied.

The Court is in recess.

IRWIN T. SHAW
Official Stenographer

[fol. 146]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

In the Matter of the Application of

SIDNEY J. UNGAR, Petitioner,

against

HONORABLE JOSEPH A. SARAFITE, Judge of the Court of General Sessions of the County of New York, Respondent,

pursuant to Article 78 of the Civil Practice Act to review a determination and order of the respondent adjudging the petitioner guilty of criminal contempt of court.

ANSWER—May 31, 1961

The respondent, above-named, answering the petition of Sidney J. Ungar, dated April 12, 1961, in the above-entitled proceeding, respectfully denies paragraphs 2-10, 16, 22, 24, 31, 32, 39, 51, 54-60, 62-76, 80-82, and 84, inclusive, and all conclusions alleged therein.

Respondent admits paragraphs 1, 21, 23, 28, 30, 44, 61, 79, and 83 insofar as the matters recited therein pertain to the proceedings had heretofore in connection with the instant matter or background material concerning various transactions engaged in by the petitioner.

In addition, the respondent neither admits nor denies the matters recited in paragraphs 11-15, 17-20, 25-27, 29, 33-38, 40-43, 45-53, and 77, inclusive, having no knowledge of the alleged facts, and the respondent further alleges that such material is wholly irrelevant to the instant application.

Wherefore, the respondent herein respectfully prays that the relief sought by the petitioner herein be denied and the petition be dismissed with costs.

Joseph A. Sarafite, Judge of the Court of General Sessions.

Sworn to before me this 31st day of May, 1961.

George L. Kelley, Deputy Clerk of the Court of General Sessions.

[fol. 448]

IN THE SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—FIRST DEPARTMENT

AFFIDAVIT OF H. RICHARD UVILLER IN
OPPOSITION TO MOTION—May 31, 1961

State of New York,
County of New York, ss.:

H. Richard Uviller, being duly sworn, deposes and says:

That he is an Assistant District Attorney in the office of the Honorable Frank S. Hogan, District Attorney of New York County, who has been requested to represent the respondent herein, and that he is familiar with the proceedings heretofore had in connection with the matter on review herein;

That the petitioner having applied, pursuant to Article 78 of the Civil Practice Act, for a review of the proceedings which resulted in an order, filed by the respondent herein, adjudicating the petitioner in criminal contempt of the Court of General Sessions, the instant affidavit is respectfully submitted in conjunction with respondent's verified answer in opposition to petitioner's motion.

By this affidavit your deponent respectfully alleges and submits the following:

1. On January 12, 1960, Hulan E. Jack, then Borough President of the Borough of Manhattan, was indicted by the Grand Jury of the County of New York, charged with the crimes of conspiracy (one count) [Penal Law §580], violation of §886 of the New York City Charter (two [fol. 149] counts), and violation of §901 of the New York City Charter (one count).

2. In the course of the proceedings before the said Grand Jury, which resulted in the indictment aforementioned, the petitioner was called and testified as a witness. During the course of his testimony, the petitioner declined to answer, on grounds of possible self-incrimination, certain questions concerning his transactions with Hulan E. Jack which were the subject matter of the Grand Jury inquiry. He was accordingly granted, at his own request, immunity with relation to such matters. The resultant indictment, which did not name the petitioner as co-defendant, nevertheless named petitioner a co-conspirator of the defendant Jack.

3. The defendant Jack was tried on the said indictment in the Court of General Sessions before the respondent and a jury. The trial commenced on June 9, 1960 and was concluded on July 7, 1960, when the jury was discharged, having failed to arrive at a verdict.

4. During the course of the said trial, the petitioner, himself an attorney, was called as a witness by the People and testified at the said trial for 6 days, from June 20, 1960 to June 27, 1960.

5. On November 15, 1960, the defendant, Jack, was retried on the said indictment before the respondent and a jury. He was convicted on December 6, 1960 of the crime of conspiracy (Count 1) and the two counts charging him with violations of §886 of the New York City Charter [fol. 150] (Counts 2 and 3). He was acquitted on the fourth count which charged him with a violation of §901 of the New York City Charter. On January 16, 1961, the respon-

dent imposed upon the defendant Jack a sentence of one year in the Penitentiary on the first count and suspended the execution thereof. The same term was imposed and suspended on the second count, concurrent with the first. Sentence was suspended on the third count.

6. At the second trial the petitioner again testified as a witness for the People. His testimony commenced on November 22, 1960 and continued until November 25, 1960.

7. The record of the respondent's testimony at both trials clearly discloses that the petitioner was reluctant, evasive and insolent, refusing to answer responsively proper questions, volunteering irrelevant matters, asserting that he had no knowledge or recollection of certain pertinent matters which were clearly known to him and cavilling about the form of certain questions.

8. His conduct indisputably revealed that the petitioner was hostile to the interests of the People, as well as to the prosecutor himself, and was, in fact, friendly to the defendant, whom he attempted to assist in every way possible.

9. The petition filed herein amply demonstrates that the interests of the petitioner are still wholly friendly to the convicted defendant Jack. The petitioner takes pains to set forth wholly irrelevant material to prove the friendly relationship between himself and the defendant Jack.

10. Owing to the manifest combination of friendly interest to the defendant and evasive and hostile conduct [fol. 151] of the petitioner during his testimony at the first trial, the respondent, out of the presence of the jury, clearly and carefully cautioned the petitioner at the commencement of his testimony during the second trial. Anticipating a recurrence of the regrettable conduct of the witness at the first trial, the respondent instructed the petitioner to avoid the evasive and unresponsive answers, the uncooperative and hostile attitude and the generally truculent conduct which had marred his testimony at the former trial.

11. Notwithstanding the repeated warnings of the court, it became clear during the petitioner's testimony at the sec-

ond trial that he was unwilling to abide by the court's direction and to conduct himself in a proper manner as a witness.

12. On November 25, 1960, after evading and refusing to answer a clear and proper question dealing with a material and relevant issue, the petitioner responded to the court's insistence on a responsive answer by shouting in an angry and disrespectful manner, "I am absolutely unfit to testify because of your Honor's attitude and conduct toward me. I am being coerced and intimidated and badgered. The court is suppressing the evidence."

13. This final contumacious and contemptuous outburst by the petitioner in the presence of and directed to a sitting court, before a jury and a courtroom crowded with representatives of the press and public, clearly constituted criminal contempt, punishable summarily.

[fol. 152]. 14. The petitioner was immediately informed by the court that his conduct was "insolent and contemptuous" and, out of the presence of the jury, he was requested by the court to keep himself available for future action by the court dealing with his contemptuous conduct.

15. After the conclusion of the trial, in order to extend to the petitioner a fair opportunity to prepare a defense or explanation, the respondent caused to be drafted and served upon the petitioner papers setting forth, in detail, the accusation against him stemming from his contemptuous conduct as a witness.

16. These papers, in the form of an order to show cause, were served upon the petitioner personally on December 8, 1960, and made returnable on December 13, 1960.

17. The election by respondent of this means to assure the petitioner full protection of his rights in no way altered the summary nature of the contempt which was brought pursuant to §750 (A1) of the Judiciary Law.

18. The full statutory period of five days between the service of the order to show cause and the return date thereon afforded the petitioner an adequate opportunity to acquaint himself with the charge against him and to consult

with or obtain the services of counsel. In this connection it should be recalled that the petitioner was himself an experienced attorney with many years of practice before the Court of General Sessions behind him. Moreover, he had been advised by the court at the time of his contemptuous [fol. 153] outburst that the court regarded his conduct as "insolent and contemptuous." He had, therefore, every reason to expect the initiation of such proceedings following the conclusion of the trial.

19. Despite such notice and the opportunity afforded petitioner by respondent, the petitioner appeared before the respondent on the return date and unreasonably requested an adjournment of the proceedings on the ground that his counsel was actually engaged in trial. It is noteworthy that this fact was not only known to the petitioner at the time he engaged such counsel, but his counsel subsequently stated on the record to the respondent that his retention was conditional upon the granting of an adjournment.

20. In view of the obvious bad faith on the part of the petitioner, the respondent properly denied the adjournment requested. In this connection, it should be borne in mind that the five day period of notice was itself more than the petitioner was entitled to upon a contempt of this nature.

21. The hearing upon the contempt charge, while summary in nature, was nevertheless fair in all respects and particularly insofar as respondent afforded the petitioner an opportunity to be heard and to place before the court any answer, explanation or circumstances in mitigation of the charge.

22. The petitioner chose to remain mute on the merits of the charge and respondent thereafter found petitioner to have acted in contempt of court.

[fol. 154] 23. This determination by the court was proper and well founded. It is substantiated by the record and, in addition, by circumstances, such as the petitioner's demeanor, which were observed by the respondent personally at the time of petitioner's contumacious conduct.

24. The petitioner was sentenced to serve ten days in a civil jail and in addition thereto, to forfeit a fine of \$250.00 or serve an additional thirty days. The petitioner commenced the service of the jail term at once on December 13, 1960, and paid the fine prior to the completion of his ten days' imprisonment.

25. During the ten days in which petitioner was incarcerated, he brought five independent actions attempting to stay or upset the judgment imposed upon him.

a) Specifically, on December 14, 1960, the petitioner had a hearing before Honorable Charles D. Breitel in the Appellate Division of the Supreme Court on an order to show cause why he should not be granted a stay of execution of his sentence pending a review of the respondent's adjudication herein. Judge Breitel, after hearing argument, refused to grant a stay of execution of the petitioner's sentence.

b) On December 15, 1960, the petitioner brought a habeas corpus proceeding before Justice Henry Epstein in the Supreme Court, New York County. Despite the lack of jurisdiction on the part of the Supreme Court to review the adjudication herein in a habeas corpus proceeding, Judge Epstein afforded petitioner a full hearing on the merits [fol. 155] of the respondent's determination herein, in which the petitioner and another witness testified fully and at length. At the conclusion of the proceeding Judge Epstein ruled,

"The circumstances, it would seem to me, prevent this Court from arriving at any other conclusion than that the remarks made, which were not the subject of an apology either immediately or shortly thereafter from the record, did warrant the Court in issuing the contempt citation and the order.

Under the circumstances before me, the writ is dismissed."

c) Also on December 15, 1960, petitioner renewed his motion made before Judge Breitel in the Appellate Division of the Supreme Court on December 14, 1960. Judge Breitel, after hearing argument on the merits, again denied peti-

tioner's motion for a stay of execution of his sentence pending a review.

d) Subsequently and during petitioner's ten-day imprisonment, he brought a third proceeding before Judge Breitel on further argument in support of his motion for a stay. After a hearing, Judge Breitel for the third time refused to grant petitioner a stay.

e) Also during petitioner's incarceration, he brought a fifth proceeding in the Supreme Court, New York County, before Judge Henry Epstein, again seeking a stay of execution in a proceeding in the nature of a motion for a certificate of reasonable doubt. Judge Epstein after argument, denied petitioner's motion.

[fol. 156] 26. Accordingly, and for the reasons set forth, the deponent respectfully prays that the application of the petitioner for relief pursuant to Article 78 of the Civil Practice Act be in all respects denied, in accordance with the verified answer of the respondent hereto annexed. In addition, the respondent respectfully prays that those exhibits filed by the petitioner herein, annexed to his petition, and the record filed by the petitioner on an appeal shortly to be perfected from the determination herein reviewed be, insofar as pertinent, deemed the return of the respondent of the records and proceedings below.

H. Richard Uviller

(Sworn to May 31, 1961.)

[fol. 157] IN THE SUPREME COURT OF THE STATE
OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

REPLY

*To the Honorable Presiding Justice and Associate Justices
of the Appellate Division of the Supreme Court of the
State of New York, First Judicial Department:*

Replying to the answer interposed by the respondent Honorable Joseph A. Sarafite and to the affidavit of H. Richard Uviller, Esq., sworn to by Mr. Uviller May 31, 1961, petitioner respectfully shows and alleges:

1. Upon information and belief, the answer of the respondent is insufficient in law and at most raises issues which require that the subject matter of the petition herein and the answer be set down for hearing and determination; the affidavit of Mr. Uviller, on the other hand, sets forth purported statements of fact of which the affiant does not have or claim to have any personal knowledge, and is therefore insufficient in law and should be stricken from the record.

2. The second paragraph of Mr. Uviller's affidavit (appearing on page 4 of the "Answer") is misleading in that it wholly omits to inform the Court of the facts that

(a) Petitioner appeared voluntarily before the Grand Jury without a subpoena on December 12, 1960, within seconds after receiving an informal request to do so from Assistant District Attorney Scotti.

[fol. 158] (b) Petitioner did not know, when he called on Mr. Scotti at petitioner's own request, that Mr. Scotti might take petitioner before a Grand Jury; while petitioner was standing outside the office of District Attorney Hogan, Mr. Scotti ran past petitioner into Mr. Hogan's office, ran out again and said, "Come on, Sidney, into the Grand Jury." Following Mr. Scotti as he asked, petitioner found himself before the Grand Jury within ten seconds.

(c) His sudden appearance before the Grand Jury without any advance warning led petitioner, virtually as a reflex reaction of surprise, to claim his constitutional privilege against self-incrimination.

(d) The very next morning, having had time to consider his claim of privilege and the fact that there was no need for it since he had nothing to hide, petitioner asked Mr. Scotti for permission to relinquish the immunity he had obtained on December 12 and to proceed with further testimony under a waiver of immunity; Mr. Scotti declined this offer, saying, "Nobody, including yourself, could withdraw that immunity from you, because the law gave it to you." Petitioner is informed and believes that Mr. Scotti's statement of the law is incorrect and petitioner reaffirms that his offer was made in good faith and should have been accepted.

Having declined petitioner's offer to surrender any immunity and to abandon his claim of constitutional privilege, Mr. Scotti proceeded at both the first and second [fol. 159] trials of Hulan E. Jack to badger petitioner with the fact that petitioner had pleaded his constitutional privilege and with the claim that petitioner's offer to waive immunity was advanced in bad faith. Respondent herein not only tolerated Mr. Scotti's misconduct in this respect at the first and second Jack trials, but now submits Mr. Uviller's affidavit in which the subject is again revived to discredit petitioner. Petitioner submits that the spectacle of a sitting Judge demeaning a witness by calling attention to his claim of a constitutional privilege, and seeking to draw inferences therefrom, is odious.

3. Paragraph 6 of Mr. Uviller's affidavit erroneously states that petitioner's testimony continued until November 25, 1960, when in fact it continued until November 28, 1960.

4. Paragraphs 7 through 13, paragraph 15, and paragraphs 17 through 23 of Mr. Uviller's affidavit set forth a distorted version of the facts which are carefully and correctly set forth in the petition herein, and Mr. Uviller incorporates in the said paragraphs conclusions of fact

and law and characterizations which are erroneous and unwarranted.

5. Paragraph 14 of Mr. Uviller's affidavit reads:

"14. The petitioner was immediately informed by the court that his conduct was 'insolent and contemptuous' and, out of the presence of the jury, he was requested by the court to keep himself available for future action by the court dealing with his contemptuous conduct."

[fol. 160] The above statement is incorrect; this is not what took place. What did take place was that respondent falsely accused petitioner of being "contemptuous . . . disorderly and insolent" while petitioner was sitting in the witness chair in the presence of the jury, petitioner was required to remain seated while the jury was excused, and respondent ordered him, although he was shaking and trembling and out of control, to remain seated in the witness chair in an empty courtroom while respondent withdrew to consider an application of defense counsel, in which petitioner joined, to arrange a medical examination of petitioner. There is no reason for the erroneous presentation by Mr. Uviller since a transcript of the actual proceedings is set forth in Exhibit 4 to the petition herein.

6. The statement in paragraph 25(a) of Mr. Uviller's affidavit that on December 14, 1960 petitioner "had a hearing before Honorable Charles D. Breitel in the Appellate Division of the Supreme Court on an order to show cause why he should not be granted a stay of execution of his sentence" is incorrect. Mr. Justice Breitel conducted no hearing. On December 14, 1960 Justice Breitel refused to sign an order to show cause containing a stay for the reason that the order was based on insufficient papers and stated that his refusal was without prejudice to a renewal of the motion upon proper papers.

7. Paragraph 25(d) of Mr. Uviller's affidavit is erroneous in stating that there was a third proceeding before Mr. Justice Breitel. No such third proceeding ever occurred.

[fol. 161] 8. Mr. Uviller's affidavit tries to maintain for respondent the atmosphere of "obvious bad faith on the

part of the petitioner" (Uviller affidavit, paragraph 20) and "evasive and hostile conduct of the petitioner during his testimony at the first trial" (id., paragraph 10), and tries to put respondent in the light of a judge who sought to anticipate at the second trial any "recurrence of the regrettable conduct of the witness at the first trial" (ibid.).

Paragraph 66 of the petition herein showed that petitioner had gone to the extent of addressing a written motion to respondent on the eve of the second trial in an effort to avoid untoward incidents. Petitioner alleged in said paragraph that when the motion was presented to respondent, respondent refused to consider it at all and directed defense counsel to suppress its contents and the fact of its existence. Respondent now has the temerity, in the first paragraph of his Answer herein, to deny that any such motion was made.

In view of this astonishing denial by respondent, petitioner annexes hereto as Exhibit A a true and correct copy of the notice of motion dated November 17, 1960 and petitioner's supporting affidavit sworn to November 17, 1960.

9. Mr. Uviller's affidavit seeks to paint petitioner as a "truculent" witness who was looking for trouble, but the plain fact is that Commissioner Robert Moses experienced the identical difficulty petitioner had with Mr. Scotti's questions, gave the same kind of "unresponsive" answers which petitioner gave at times, yet was treated with reasonable courtesy and understanding by the respondent Judge. Mr. [fol. 162] Moses began as a municipal investigator in 1913 and has served on numerous investigating commissions and as Moreland Act Commissioner and is as familiar as any lawyer with the process of eliciting testimony by question and answer. Petitioner respectfully refers the Court to the cross-examination of Mr. Moses in the second Jack trial for an example of the way respondent met the same problems which petitioner presented as a witness, when the witness was another person, viz., Mr. Moses.

A true and correct transcript of the entire cross-examination and re-direct examination of Mr. Moses at the second Jack trial is annexed hereto and marked Exhibit B.

10. The fact is that in the second Jack trial the respondent was seeking to create an incident during petitioner's testimony which could be converted into either a contempt charge or a perjury charge. In spite of this, the suggestion is now made that petitioner might have cured the alleged contempt by a full apology. The fact is that at the contempt hearing the respondent informed petitioner's attorney during a conference at the bench (before petitioner's attorney, upon being denied an adjournment because of actual engagement, had to withdraw) that even a full apology would not cure the alleged contempt but would only be taken into consideration upon the sentence; this only emphasizes that respondent had prejudged petitioner's guilt.

Sidney J. Ungar, Petitioner.

William G. Mulligan, Attorney for Petitioner, 36 West 44th Street, New York 36, New York.

[fol. 163]

State of New York,
County of New York, ss.:

Sidney J. Ungar, being duly sworn, deposes and says that he is the petitioner in the within proceeding; that he has read the foregoing reply and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Sidney J. Ungar

Sworn to before me, this 21st day of March, 1962.

John A. K. Bradley, Notary Public, State of New York,
No. 31-0383810, Qualified in New York County, Comm.
Expires March 30, 1963.

[fol. 164]

EXHIBIT A TO REPLY
COURT OF GENERAL SESSIONS
COUNTY OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,
against

HULAN R. JACK,

Defendant.

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Sidney J. Ungar, duly sworn to the 17th day of November, 1960 and the exhibits annexed hereto, the undersigned will move this Court at a Stated Trial Term hereof, in Part VI on the 13th floor, at the Courthouse, 100 Centre Street, in the Borough of Manhattan, City of New York, forthwith, on the 18th day of November, 1960, at 10:00 A.M. of that day or as soon thereafter as counsel can be heard, for an order determining that the status of the witness, Sidney J. Ungar, shall be considered as if he had been called by the Court, and that the said witness be given the protection of the Court against any improper, unfair, collateral or irrelevant questioning by either the District Attorney or defendant's counsel, and for a further order permitting the witness to refresh his recollection on any details he may not recall by reference to this [fol. 165] former testimony thereon, and for such other and further relief as to this Court may seem just and proper.

Dated: New York, November 17th, 1960.

Yours, etc.,

SIDNEY J. UNGAR, pro se
Office & P. O. Address
350 Broadway
New York, New York

To:

CARSON DEWITT BAKER, Esq.,
Attorney for Defendant.

To:

FRANK S. HOGAN, Esq.,
District Attorney.

[fol. 166] COURT OF GENERAL SESSIONS

COUNTY OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK

against

HULAN E. JACK,

Defendant

State of New York,
County of New York, ss.:

SIDNEY J. UNGAR, being duly sworn, deposes and says:

That I am an attorney-at-law duly admitted to practice law in the State of New York and have been engaged in said practice since 1935. That I am also engaged in the business of syndication, developing and managing real estate.

That on November 16th, 1960, I arranged to and did accept service of a subpoena by the People in the above proceeding presumably to be called as a State's witness. I had sent to the trial Court a communication dated November 15th, a copy of which is attached hereto marked Exhibit "A" herein along with copies of three other letters referred to therein. The said other letters were (1) a letter by my attorney, Moses Kove, Esq., to District Attorney Frank Hogan, dated September 29; (2) letter response from District Attorney Hogan dated October 4th and (3) letter sent by me to Assistant District Attorney Alfred Scotti dated October 27th, and are attached hereto [fol. 167] marked Exhibits "B", "C" and "D". Copies of all of said were sent to the District Attorney and counsel for the defense.

A reading of the communications to the Court reveals that I had asked for essentially the same relief requested herein. However, due to the fact that since sending the letter to the Court I have now been officially subpoenaed as a witness, and more importantly, the conclusion and opinion I expressed in my letter to the Court that Mr. Scotti will again seek to make me a hostile witness has been confirmed

by his public characterization of me a hostile witness in his questioning of the jury, I believe that I should now formally move for the relief requested in said letter. Although I understand Mr. Scotti in his questioning did not mention me by name, there can be no doubt, on the basis of the witnesses he called at the first trial and his attitude toward me in the Grand Jury and at the first trial and since, that he could have had no one else in mind but me.

It is apparent, therefore, that despite my and my attorney's repeated assurances to Mr. Hogan and Mr. Scotti that I am not hostile to the case of the prosecution, and desire only to be objective and neutral, that they have determined for their own reasons not to consider me as such.

Despite this Court's finding after two days of examination on the first trial that I was a hostile witness, I respectfully submit that I was not then, nor am I now a hostile witness. I make this statement after deep soul-searching and unequivocally. I have never denied that there exists between Mr. Scotti and myself a deep-rooted personal hostility and dislike and there is no doubt that I did not [fol. 168] disguise or attempt to disguise this personal feeling in the Court, but my attitude toward a prosecution has nothing to do with my duty and obligation as a witness and an officer of this Court to tell the whole truth without fear or favor. Merely a personal dislike of the State's attorney does not make me a hostile witness.

I respectfully submit that the Court confused my apparent attitude toward Mr. Scotti with my attitude toward the cause of the prosecution or the truth. I maintain this position despite my personal belief, publicly expressed, in the defendant's innocence. I may believe, based on my knowledge of facts which have never been developed, in the defendant's innocence, and still fully, honestly and truthfully testify as to the facts and occurrences. I submit that it is precisely because Mr. Scotti did not want to develop the full facts that I have been declared hostile. It did not suit the cause of the prosecution, and even defense strategy or theory of defense, to allow all the facts and evidence to be developed.

This is why I was caught in a vise between both counsel and why my rights under Canon 18 of the Code of Profes-

sional Ethics were so flagrantly abused and violated, and why I am now respectfully invoking the protection of the Court and asking the Court to consider me its witness and have asked for the privilege of refreshing my recollection on details of my testimony.

In this connection I would like to observe that I believe that my testimony on the first trial to the extent that I was permitted to testify was the same as my grand jury testimony [fol. 169] which Mr. Scotti never let me look at even though I had testified on ten different occasions more than six months before the trial. The press also observed privately that everything that I had testified to with respect to my participation in the Jack matter was not in any way contradictory and in complete accord with the press conferences I had held, and there was no evidence that I was guilty of any public misrepresentations, perjury, subordination of perjury or other similar acts.

I do hereby further state under oath that in this trial that I will again testify to the extent that I am permitted, fully and completely, insofar as my present recollection permits, as to my participation in this matter. I declare under oath that there is no intention to have any convenient lapses of memory, and the sole reason for seeking the right to review my testimony was to eliminate any area of false impressions that I am seeking to conceal evidence. In fact I have been seeking just the contrary. The desire to testify to all the relevant and material facts is what created my problem and difficulties with both counsel and the Court in the first trial.

I believe I should also observe at this point that since I wrote the Court on the 15th, I received a call from Mr. Scotti suggesting a procedure which after discussion with my attorney I was inclined to accept.

However, after reading, that while presumably offering me the olive branch, Scotti was simultaneously already publicly declaring me hostile, I could not accept his proposal as being made in good faith and I advised my attorney to so tell him.

[fol. 170] I do not know whether the Court will consider the statements contained herein as evidence of hostility, but it is my understanding that a hostile witness is one who

"conceals as much and reveals as little of the truth" as possible (Richardson on Evidence, P. 480). That is the exact opposite of my position and attitude in this case and on this trial. I have always wanted the *full* truth to be established.

However, should the Court believe or find that I am technically a hostile witness to the prosecutor, I feel that it becomes even more important that I be considered the Court's witness and be protected by the Court. I do hereby categorically state that I will continue to testify as to the whole truth without reservation, to the extent that I am permitted and I hope that in these areas where I am not permitted to testify fully by counsel that the Court will permit me to so testify, for the reason that in this prosecution it is my desire that the whole truth be revealed.

May I most respectfully state that the unfortunate differences between the Court and myself on the first trial occurred because I thought the Court was neglecting my rights as a witness under Canon 18 of the Code of Professional Ethics and because I felt that I was not being permitted to relate all of the relevant and material facts in my possession.

I not only sincerely hope to, but I will make every effort on this trial to comply completely with the Court's rulings and instructions to me as a witness, but I respectfully ask that the Court give full and due consideration not only to the application for the relief sought herein, but to all the facts and allegations contained herein.

[fol. 171] I am nominally a prosecution witness, but I believe the facts and history of this prosecution from its inception clearly establish that Mr. Scotti had predetermined plan to destroy me publicly. As part of this plan, I was on the first trial, tried in absentia with false irrelevancies brought out through the testimony of the preceding witness, Mr. Bechtel. Then, after an hour's general questioning during which I attempted to give him full co-operation, I was suddenly disowned by Mr. Scotti despite the fact that he had assured me several times before I testified that I would not be treated as hostile. I was treated as hostile in order to force answers to specific questions, without permitting

me to give the full picture. This permitted Mr. Scotti to present a warped, distorted, half-truth version of my role, and of the true and full facts insofar as I was concerned. This occurred without objection from the defense because it suited defense strategy to have me discredited. Then defense counsel used the same tactics.

I was thus in a fantastic crossfire and was never able to give full and complete answers to questions or full conversations and proof of facts. It had always been my belief that the purpose of a trial was an inquiry and search for the full truth.

Mr. Scotti having failed to discredit me then with deliberate malice, not only implied in his final wholly improper questions to me, the expectation of disciplinary proceedings, but held a press conference thereon immediately, stating he was going to send the record to the Bar Association for study.

[fol. 172] It is my belief that Mr. Scotti unquestionably knew from the facts in his possession that I had never actually committed any act of conspiracy to obstruct justice. He knew that I had no personal motive either as the basis of the original transaction I had with Jack or my participation in the ill-conceived cover-up. In fact I understand, according to the press, that in this summation, he admitted that at the time I agreed to go along with the cover-up story I had no motive except to help Jack and that I had at that point committed no crime.

The defendant's attorney by his defense not only made no objection to all this, but it suited his peculiar theory that if Mr. Jack was guilty it was only because of my "evil genius". Being thus made the sacrificial lamb by both sides I suffered anguish, degradation, indignity and humiliation to a degree that I would not have thought possible.

My only "offense" was, without personal motive or gain, foolishly and rashly allowing myself to be talked into helping a friend in distress concerned about ruinous publicity. There isn't any question but that once it became an official investigation I wanted nothing more to do with the matter and rejected repeated efforts to involve me. The Court may recall that in several public statements I referred to and

confessed to poor judgment and to having made a mistake in allowing myself to be a party to the cover-up story, but that is quite different from an allegation of criminality and deliberate participation in a criminal conspiracy to obstruct justice. For this one thoughtless act I was pilloried and crucified.

The District Attorney and the defense counsel could not have done a more effective job of making me appear [fol. 173] to be the defendant, than if they had agreed upon such a course of conduct.

By virtue of the aforesaid tactics engaged in by both counsel my reputation has not only been smeared most seriously and not only has a question of my professional conduct been raised by my integrity as a real estate syndicator has been damaged by the outrageously false inferences that I have engaged in dishonest business tactics.

Summed up simply, I respectfully state that I have knowledge of facts pertinent to this case and which may effect the outcome thereof, which have not been heretofore presented, and which to be adduced and established may require the intervention and the assistance of the Court.

WHEREFORE, I respectfully ask that the Court grant the relief requested in the accompanying notice of motion.

SIDNEY J. UNGAR

Sworn to before me this 17th
day of November, 1960

Note: The foregoing affidavit refers to letters exchanged between District Attorney Hogan, Moses Kove, Esq., petitioner, Mr. Scotti, and respondent. Copies of the said letters are set forth at pages 69-77 of the record on appeal in *In the Matter of the Criminal Contempt of Sidney J. Ungar, Respondent-Appellant; Honorable Joseph A. Sarafite, Judge of the Court of General Sessions, Complainant-Respondent.*

Respondent incorporates by reference in paragraph 26 of Mr. Uviller's affidavit, sworn to May 31, 1961, the entire record on appeal in the said case.

The said four letters are therefore before this Court.

[fol. 174]

EXHIBIT B TO REPLY

[877] *Cross examination by Mr. Baker:*

Q. Mr. Moses, I think you testified on direct examination that in 1956 Hulan E. Jack conferred with you in respect to general Title I projects, and particularly an interest in Riverside-Amsterdam, is that correct, sir?

A. That's correct.

[878] Q. Did he tell you what interest he had in Riverside-Amsterdam and why?

A. Come up here closer where I could hear you.

Q. I don't take orders. Do you wish me to come up?

The Court: The witness says he can't hear you.

Mr. Baker: He directed me to come closer.

The Court: Now, probably he shouldn't have said it that way. The nub of it is he says he can't hear. Either raise your voice, Mr. Baker or come closer.

Mr. Baker: May I have the question read back?

The Court: Certainly. Read it.

(The question was repeated by the Court Stenographer as follows:

"Q. And did he tell you what interest he had in Riverside-Amsterdam and why?")

A. He said he was under obligation to Mr. Ungar.

Q. Incidentally, Mr. Moses, have you reviewed your testimony that you gave in this case on the first trial?

A. No.

Q. Have you refreshed your recollection as to the fact that he did say that he was obligated?

A. I don't know what you mean.

[fol. 175] Q. I will repeat: Have you refreshed your [879] recollection?

A. I said no.

Q. Let me read something to you, what you testified to under oath in the last examination, page 1467. The question was asked you, sir:

"Q. Did he also tell you that he was obligated to Mr. Ungar?

A. I don't recall his saying that."

Do you remember that question being asked?

A. I do not.

Q. Would you say it was not asked you?

A. It depends on how you interpret it.

Q. I am referring to typing on page 1467 of your testimony.

A. I don't know what page 1467 is.

Q. Would you say the question was not asked you?

A. I don't recall.

Q. Would you say that Mr. Scotti did not ask you, "Did he also tell you that he was obligated to Mr. Ungar" and you answering under oath, "I don't recall his saying that"?

A. I don't recall saying precisely that, but the effect of it was that he told me he was obligated.

Q. I didn't ask you the effect. I ask you again, did you make that answer to a question propounded as to obligation by Jack, propounded by Mr. Scotti?

A. I [880] don't remember.

Q. Does the reading of your testimony under oath refresh your recollection?

A. It's all a question on how you interpret it.

Q. Your recollection, not mine.

A. I don't know what you mean.

Q. I ask you again, the reading of the testimony you gave in the last trial as to the question of obligation, does it refresh your recollection?

A. No, I don't know anything about except what I have just said.

[fol. 176] Q. Would you say that your answer to the question on page 1467 of the record, "I don't recall his saying that," was untrue?

A. I told you all I know on that subject.

Mr. Baker: I respectfully ask the Court to direct the witness to answer.

Mr. Scotti: I object to this misleading question because counsel is not quoting or referring to the entire testimony of this witness. Counsel himself cross examined this wit-

ness, and he has omitted reference to testimony which he himself elicited from this witness on cross examination.

Mr. Baker: May I be heard, if the Court please? [881] Of course, it has been an established pattern that Mr. Scotti has selected tidbits of testimony and asked witnesses, "Did you say this?" and required the witnesses to say yes or no. I am referring to testimony given by this witness under direct examination propounded to the witness by Mr. Scotti, which is in contradiction to what he presently testifies to, and I think that I am entitled to do so.

Mr. Scotti: Your Honor, it is not the whole picture.

The Court: Mr. Scotti, let us proceed. You can bring out the whole picture on redirect. The objection is sustained at this point. Proceed.

Q. I ask you again, Mr. Moses, was this question asked you and did you give this answer, and was it a true answer: "Did he also tell you that he was obligated to Mr. [fol. 177] Ungar?" Answer, "I don't recall his saying that."

A. I don't recall the answer, no, but that is the substance of it, that he was obligated. That's what he said.

Mr. Baker: I move to strike it out, if the Court please, as not responsive to the question.

Mr. Scotti: It is responsive, your Honor.

The Court: Yes, it is responsive. The motion to strike it out is denied.

Q. You didn't refresh your recollection as to what [882] you testified to before, did you?

A. No.

Q. And you testified that you did not have any different recollection as to what you said at the last trial, is that correct?

A. I gave you the substance of what happened, as I recall it.

The Court: You mean, Mr. Witness, what happened between you and the defendant or what happened at the last trial? You mean the first trial?

The Witness: Both.

Mr. Baker: May I have it read back?

The Court: Yes. Read it.

(The record was thereupon repeated by the Court Stenographer.)

Q. Do you deny that you stated that you didn't remember him saying he was obligated? Do you deny so testifying?

A. I don't deny anything.

Q. Do you deny so testifying—not anything—so testifying?

A. I don't recall.

Q. Did Hulan Jack in his discussion with you tell you that he had a meeting in his office with a representative [fol. 178] of your Committee, Mr. Lebwohl, where this matter of Title I known as the Riverside-Amsterdam had been discussed in detail?

A. I don't remember.

Q. Do you remember Lebwohl coming back and [883] giving you a report on what was done at the meeting?

A. No.

Q. But you do remember Lebwohl coming back to you in March, 1959, and giving you a report, don't you?

A. Oh, he reported to me from time to time on all projects. I don't remember the details.

Q. I said you do remember that he came back in March, 1959 and gave you a report?

A. I said I discussed a great many projects with him, of which doubtless this was one.

Q. I didn't ask you that.

A. Well, that's my answer anyway.

Q. We will see. Mr. Moses, you testified on direct examination that you remember Lebwohl coming back and giving you a report in March, 1959, did you not?

A. If that's in the record, that's it.

Mr. Baker: Now, if the Court please, at this time I respectfully request the Court to direct the witness to give a direct answer to the question. What is in the record is not the question that I asked.

The Court: Now, Mr. Witness, I think you have observed that up to now there has been a number of objections as to

form here. Will you try to answer that question directly, if you can?

[fol. 179] [884] Would you read it, please, Mr. Reporter? Did you hear what I said Mr. Moses?

The Witness: Yes.

The Court: Read it, Mr. Reporter.

(The question was repeated by the Court Stenographer as follows:

"Q. Mr. Moses, you testified on direct examination that you remember Lebwohl coming back and giving you a report in March, 1959, did you not?")

The Court: He is asking you whether you testified here on the stand in answer to Mr.—

The Witness: If that's in the record, yes, that's it.

The Court: He does not want that answer.

The Witness: I know, but I have an awful lot of things to do, and this is only one of them. I can't remember every detail of every job and every meeting. I have thirty or forty a day.

The Court: He is not asking you that, Mr. Moses.

The Witness: I know he is not. That's it anyhow.

The Court: He is not asking you that. You were asked a question by Mr. Scotti with regard to a talk with Mr. Lebwohl. As I recollect, you were asked the date, and my recollection is you were not certain. At [885] that point the District Attorney introduced into evidence a piece of paper known as a memorandum from Mr. Lebwohl to you, and the [fol. 180] date on that piece of paper was March 26, 1959. Then you were asked by the District Attorney, "When did you have this talk with Mr. Jack?" and my recollection is you said in March of 1959.

The Witness: That's right.

The Court: Now he is asking you was that your testimony? The answer is yes or no.

The Witness: Yes, that was my testimony, if that's what he is asking.

The Court: Next question.

By Mr. Baker:

Q. Now, I show you People's Exhibit 27 in Evidence and ask you to look at it, and will you tell me what on that memorandum refreshes your recollection beyond the substance of the memorandum as to the conversation had with Hulan Jack?

A. I can't answer that.

Q. Do you recognize, sir, that this morning, November 29, 1960, you looked at People's Exhibit 27 and the District Attorney asked you—

A. Yes, I remember that very well.

[886] Q. Very well, sir.

A. Yes.

Q. And the District Attorney asked you, after looking at People's Exhibit 27 in evidence, did it refresh your recollection as to a conversation you had with Lebwohl?

Mr. Scotti: Just a minute. I asked him whether it refreshed his recollection as to the general time he had the conversation.

o Mr. Baker: I accept your correction, the general time.

[fol. 181] Q. But it did indicate you had a conversation with Lebwohl, did it not?

A. Oh, yes.

Q. What about Exhibit 27 in Evidence, which refreshed your recollection that Lebwohl told you that Hulan Jack said he was obligated to Ungar?

A. When I saw the paper I recollected it.

Mr. Scotti: Just a minute. What is this question? Read it back to me.

Mr. Baker: If the Court will permit it.

Mr. Scotti: With your Honor's permission. I am sorry.

The Court: Yes, read it.

Mr. Scotti: I apologize for the way I made that request, your Honor.

[887] The Court: Read it, Mr. Reporter.

(The question was repeated by the Court Stenographer as follows:

"Q. What about Exhibit 27 in Evidence, which refreshed your recollection that Lebwohl told you that Hulan Jack said he was obligated to Ungar?")

Mr. Scotti: I object to the question.

The Court: Sustained. Next question.

Mr. Baker: Exception.

The Court: Exception to the defendant.

Q. Reading, Mr. Moses, from your last testimony at page 1468. Withdrawn. May I start so there will be a proper sequence:

"Q. Did he also tell you that he was obligated to Mr. Ungar?"

Mr. Scotti: What page is that?

Mr. Baker: Page 1467, Mr. Scotti.

[fol. 182] Q. (Continued) "A. I don't recall his saying that.

"Q. Or under obligation to him?

A. I told you I got that impression."

Was that question asked and did you give that answer?

A. No.

Q. You did not?

A. I don't remember it.

Q. Do you say you didn't give that answer?

[888] A. No, I don't.

Q. And this question was asked on page 1468:

"Q. But what I read to you before the grand jury was not an impression, was something he told you?" Withdrawn. Strike it out. May I re-read it?

"Q. But what I read to you before the grand jury was not an impression, was something he told you, am I correct, sir?

A. That's right."

Was that question asked and did you give that answer?

A. I don't recall all the details of all this testimony.

Q. Would you say you didn't give the answer?

A. No, I wouldn't say that either.

Q. Would you say the question was not asked you?

A. (No answer.)

Q. You may answer. I didn't get an answer.

A. Please read it again.

The Court: Read it, Mr. Reporter.

(The last question was repeated by the Reporter as follows:

"Q. Would you say the question was not asked you?"

A. No, I wouldn't say it wasn't asked me.

Q. There did come a time, acting as Chairman of the Slum Clearance Committee, that you formulated a [889] [fol. 183] resolution and submitted it to the Board of Estimate to request the Federal Government to provide study funds, is that correct?

A. Yes.

Q. Incidentally, are there any notes on the paper you are looking at?

A. Any notes?

Q. Yes.

Mr. Scotti: That an exhibit, is it not, in evidence?

Mr. Baker: Let's have it.

Mr. Scotti: I object to this statement and I move to strike it out.

The Court: Strike it all out.

Mr. Scotti: It is unfounded.

The Court: Strike it out.

Mr. Scotti: And unwarranted.

Mr. Baker: If the Court please, the witness was paying special attention to that letter, and I wanted him to listen to the question.

The Witness: That's the letter you gave me.

Mr. Baker: I wasn't directing my question to that letter.

By Mr. Baker:

Q. Did your Committee send a resolution to the Board of Estimate asking for federal funds for study?

[890] A. Yes, that's the same question you just asked me.

Q. Will you answer it again?

A. It's the same answer.

The Court: Wait a minute.

Mr. Scotti: There is no reason for counsel to be barking at this witness continually.

[fol. 184] Mr. Baker: The witness asked me to speak louder.

Mr. Scotti: Barking isn't necessary.

Mr. Baker: And the Court asked me to speak louder.

Mr. Scotti: You are barking.

Mr. Baker: I resent the designation "barking" by the First Assistant District Attorney of New York County. I move to strike it out.

Mr. Scotti: I request respectfully that counsel conduct his examination in audible fashion, but not in the noisy manner that he has been conducting it. I think it is offensive to the witness.

Mr. Baker: I object to the word "noisy".

The Court: Are you through? Are you both through? Do either of you intend any of this to be evidence to be considered by the jury?

Mr. Baker: I do not, sir.

The Court: Do you, Mr. Scotti?

Mr. Scotti: No, your Honor.

[891] The Court: Disregard it, ladies and gentlemen. Pay no attention to it.

Now, Mr. Witness, I appreciate what you said before about being a busy man and having many things on your mind, but I think it must be quite obvious to you now that unless you try to confine your answers simply to the question that we are going to have a delay in this proceeding.

I should like to have the last question and answer read, [fol. 185] and I will point out what I mean. Please listen to it. Read that, please, Mr. Reporter.

(Thereupon the record was repeated by the Court Stenographer.)

The Court: Even though it is the same question he just asked you, I suppose the answer to that question could have been "Yes".

The Witness: The answer is yea.

The Court: To save time. You can see what is happening here, Mr. Moses?

The Witness: No, I don't, as a matter of fact.

The Court: Well, I will try to explain it. You are adding, "That's the same question that you asked me before."

That is not a direct response to the question [892] and it creates all of this squabble or dispute or colloquy, which I think is wholly unnecessary.

The Witness: Why should a question be asked three times?

The Court: Now, Mr. Moses, that is really none of your business.

The Witness: Maybe it isn't.

The Court: It is none of your business at all. That's a matter for the Court. If the Court in its discretion permits the repetition of a question, that's the Court's prerogative, and it is not for a witness to pass upon that.

Let's proceed, gentlemen.

By Mr. Baker:

Q. What did you with that money, the Slum Clearance Committee?

A. Prepared a brochure.

[fol. 186] Q. Did the brochure consider what buildings were to be demolished?

A. The Brochure met all the requirements of Federal, State and local law.

Q. I ask you again, did it provide for what buildings were to be demolished?

A. I think it did.

Q. Did it investigate the financial status of the proposed sponsor?

[893] The Court: The brochure?

Mr. Baker: The study.

Q. Did the study go into the financial responsibility of the sponsor?

A. By name?

Q. Financial responsibility in any manner?

A. No.

Q. It did not?

A. No.

Q. Did the brochure—Withdrawn. Did the study ever go into an investigation of the character of the sponsor?

A. No.

Q. It did not. Did the study that the Federal Government supplied funds for go into an investigation of mortgages, indebtedness and ownership of property by the proposed sponsor?

The Court: May I ask you, Mr. Baker, the legal relevancy of these questions to the issues in this case on trial?

Mr. Baker: Yes, your Honor.

The Court: I would like to hear it.

Mr. Baker: There has been adduced from this witness over objection by counsel for the defense, testimony in respect to publicity which was referred to, as indicating it was unfavorable to the sponsor for the reason of his land-[fol. 187] lord attitude, and its effect upon the [894] passage of the resolution before the Board of Estimate. I wish by inquiry as to what use was made of the money for study, to ascertain whether or not that study, that money, that procedure of the Slum Clearance was not required under law as a means of ascertaining the position of means, character and his ability and his holdings.

That's the question and it is addressed to the door which was opened by the District Attorney.

The Court: Well, I don't think the door was opened that wide.

I take it that this witness' testimony is being elicited on counts three and four of the indictment. Count three charges that the defendant knowingly and intentionally did accept gifts, loans and things of value amounting to \$4,400. from Sidney Ungar, a person interested, directly and indirectly, in the acquisition of property, the expense, price and consideration of which is payable from the treasury of the City of New York; and in the purchase of real property belonging to or taken by the City of New York in connection with a Title I Slum Clearance project known as the

Riverside-Amsterdam project, and I now rule that your question is not competent, relevant and material on [895] that issue, and you have an exception.

I also take it that this testimony is being elicited with respect to Count Four of the indictment, which charges that [fol. 188] the defendant knowingly did accept and receive gratuities from Sidney Ungar, a person whose interests might be affected by the defendant's official action, to wit, by the defendant's actions as a member of the Board of Estimate in relation to a Title I Slum Clearance project known as the Riverside-Amsterdam Project, of which the said Sidney Ungar was then the proposed sponsor.

I rule that your question is not competent, relevant and material on the issues raised by that count, and you have an exception.

Mr. Baker: I respectfully except.

The Court: Put your next question.

Mr. Baker: May I have five minutes?

The Court: Sir?

Mr. Baker: May I have five minutes?

The Court: Yes. We usually take our recess at this time. Ladies and gentlemen, do not discuss the case, do not form or express any opinion. We will take a brief recess.

(Whereupon, at 11:35 A.M. a recess was taken.)

[896] After Recess—12:00 M.

(Mr. Scotti, Mr. Clark, Mr. Gasarch, Mr. Baker, Mr. Edmonds and the defendant are present.)

(The jurors and alternate jurors come into the court room and take their seats in the jury box.)

The Clerk: People of the State of New York against Hulan E. Jack. The defendant and his counsel present, the District Attorney present.

[fol. 189] Ladies and gentlemen of the jury, please answer to your names.

(The names of the jurors and alternate jurors were called by the Clerk and each juror answered present.)

ROBERT MOSES resumed the stand and testified further as follows:

Direct examination.

By Mr. Baker (continued):

Q. Referring, Mr. Moses, to People's Exhibit 27 in Evidence, the letter of October 19th—

The Court: No, that is not 27, Mr. Baker. Exhibit 27 is a memorandum from Liebowhl to Moses.

Mr. Baker: I am very sorry, your Honor. I didn't look on the back of it. It is 26.

The Court: Please try to get the correct numbers.

Mr. Baker: I shall do so, sir.

[897] Q. Referring to People's Exhibit 26 in Evidence, dated October 19, 1956, this is a copy of a letter you sent to Mr. Jack, is it not?

A. Yes.

Q. Now, on the occasion of October 19, 1956, you and your committee were acting favorably on Title I, Riverside-Amsterdam Project is that correct?

A. Yes, sir.

Q. As a matter of fact, you and your Committee acted favorably on Riverside-Amsterdam Project until there was what you referred to as publicity, unfavorable publicity of the proposed sponsor?

A. What date?

Q. Of the publicity?

A. You said the Committee, the Chairman of the Committee you said.

[fol. 190] Q. October 19th indicates the Chairman of the Committee and the Committee were pushing the Riverside-Amsterdam Project?

A. Yes.

Q. And it was not until the unfavorable publicity came out that you changed your mind, is that correct?

A. You mean I as an individual, as the Chairman or the Committee?

Q. As a member of the Committee?

A. The Committee?

Q. Yes?

A. That's right as to the Committee.

Q. As a matter of fact, as Chairman of the Slum [898] Clearance Committee, you were only one member, is that correct?

A. That's correct.

Q. And whether you valued the judgment of a public official, it was used only for your benefit as to how to vote on the project, is that correct?

A. I don't understand you.

Q. Very well, I will rephrase it. I take it, Mr. Moses, as Chairman of the Slum Clearance Committee that there were other members than yourself?

A. Yes.

Q. For example, there was a person by the name of Thomas J. Shanahan, Vice-Chairman?

A. Yes.

Q. There was a man, James Felt?

A. Yes.

Q. And there was a person, Peter J. Reedy, now Commissioner of Housing and Buildings?

A. Yes.

Q. Now, really, those names, together with yourself, constituted the Slum Clearance Committee, did it not?

A. That's right.

Q. Let me ask you this sir: Did you ever indicate—Withdrawn. Did you ever of your own motion, without consultation with the other members of your Committee, approve a project?

A. What do you mean by approve a project? I was [fol. 191] Chairman of the Committee. I had no authority outside of being Chairman of the Committee.

[899] Q. Very well.

A. I had no authority as an individual.

Q. Very well, sir. And you exercised no such authority?

A. I didn't exercise any authority that I didn't have.

Q. Now, let me read to you, sir, from People's Exhibit 28 in evidence the third paragraph:

"By way of contrast, Riverside-Amsterdam, which I endorsed solely on your earnest recommendation, seems also

to be dead, so far as the original plan and sponsorships are concerned, but this is not announced in the press, and we are asked to carry the responsibility."

Would you tell this Court and jury what you meant when you wrote to Mr. Hulan E. Jack as indicated in People's Exhibit 28 in Evidence, the phrase, "I endorse solely on your earnest recommendation"?

A. What I meant by it?

Q. Yes.

A. I meant I endorsed it to the Committee.

Q. But you didn't put it in that form, did you?

The Court: Excluded.

Mr. Baker: Exception.

The Court: Exception to the defendant. Next [900] question.

Q. Now, this Exhibit 28 in Evidence really is a letter of complaint about press releases, is that correct?

A. About what?

Q. Press releases?

The Court: What is the relevancy of that question, Mr. Baker, in this case? Can you give a legal reason?

[fol. 192] Mr. Baker: If the Court wishes to restrict me—

The Court: I am not going to restrict you at all, unless in my judgment under the law the material being elicited is incompetent, irrelevant and immaterial to the issues in this case. And I don't think you have any right to take umbrage at a question from the Court asking you to state the legal reasons for your eliciting this particular piece of evidence.

Mr. Baker: I should be glad to.

The Court: If you take umbrage at it, I am very sorry, but I have a job to do here, Mr. Baker.

Mr. Baker: I did take umbrage, if the Court please, for the reason that the Court indicated some concern—

The Court: Do you wish to give the legal reason?

Mr. Baker: Yes.

The Court: You don't have to if you don't want [901] to.

Mr. Baker: I will be glad to, sir, to give the legal reason why I have referred to People's Exhibit 28 in Evidence.

The Court: That is not my question, not the legal reasons for your referring to the exhibit at all.

Read what I said, please, Mr. Reporter.

(The record was repeated by the Court Stenographer.)

The Court: I am willing to terminate this and proceed, Mr. Baker, if you prefer.

Mr. Baker: I didn't instigate it, if the Court please. It was the Court's observation.

[fol. 193] The Court: Let us proceed, then. We will deal with the next question when it arises. Proceed.

By Mr. Baker:

Q. Mr. Moses, did you testify—Withdrawn. Is it your position that you gave consideration to recommendations made to you by City officials, such as Borough Presidents?

A. Oh, yes, Borough Presidents.

Q. All of them, isn't that correct?

A. All Borough Presidents. You mean from all City officials?

Q. All Borough Presidents.

A. Yes, certainly.

Q. As a matter of fact the Borough President of [902] the Bronx, Kings or Queens would confer with you in respect to Title Ones?

A. We invite it.

Q. You invite it and they confer with you?

A. Certainly.

Q. So when the defendant Hulan Jack conferred with you in respect to Title I it was not unusual?

A. Not only not unusual, but as was indicated before, at the request of the Mayor we invited the Borough President and his assistants to attend all meetings because there were so many projects in Manhattan that we welcome their assistant, and they did attend all meetings, all meetings.

Q. And you gave weight to their judgment in respect to projects in the particular borough that they were?

A. If you don't pay attention to them you don't get anything done.

Q. Did you confer with the Borough President Hulan E. Jack of Manhattan in the Clear Hook Housing, Delano Village?

A. Yes.

Q. Lenox Terrace?

A. Yes.

[fol. 194] Mr. Scotti: Excuse me. I don't like to interrupt the cross examination, your Honor, but I can't see the relevancy of this last questioning: We are not concerned with these other projects. We are concerned [903] with the project known as Riverside-Amsterdam Project, your Honor. I don't see the relevancy.

The Court: It may have some materiality. Overruled.

Q. The N.Y.C. Bellevue Kip Project, you conferred about that?

A. Yes.

Q. As a matter of fact, Commissioner Moses—

A. All projects in Manhattan.

Q. There was nothing special about Riverside-Amsterdam, was there?

Mr. Scotti: I object. This is a conclusion. That is something for the jury to pass on.

The Court: Sustained as to form.

Q. There did come a time when your Committee, after approving the resolution for funds to study, determined that the Riverside-Amsterdam under Sidney Ungar was not further to be sponsored by your Committee?

A. Yes, eventually that time did come.

Q. There came a time, did there not, which happens in Government—

A. What's that?

Q. There came a time, did there not, which happens in Government, that there was adverse publicity in respect to mid-Harlem, where Costello's partner was involved, is that correct?

[904] Mr. Scotti: I object.

The Court: I didn't hear part of the question. Would [fol. 195] you read that, please, Mr. Reporter, just the first part.

(The record was thereupon read by the Court Stenographer.)

The Court: Objection sustained.

Q. There came a time, did there not, in respect to mid-Harlem that there was adverse publicity as to Costello's partner in the mid-Harlem project, is that correct?

Mr. Scotti: I object to this, your Honor, as completely irrelevant to the issues in this case.

The Court: Sustained.

Q. Mr. Moses, when you gave consideration to what you referred to as the judgment of the Borough President of Manhattan in respect to Riverside-Amsterdam, that consideration was predicated, was it not, upon his official position, carrying out his duties under his oath of office, is that correct?

A. Yes, that is correct.

Q. Nothing surreptitious about it, was there?

A. Nothing what?

Q. Surreptitious about it?

[905] Mr. Scotti: I object to this question on the ground—

The Court: Sustained.

Q. There wasn't a deal between Hulan Jack and Robert Moses to approve—

Mr. Scotti: I object to the question.

Mr. Baker: I haven't finished the question.

Mr. Scotti: You said enough for me to make an objection.

[fol. 196] Mr. Baker: I don't think I have. I think it is proper for you to let me finish the question.

Mr. Scotti: I am sorry. Proceed, Mr. Baker.

Mr. Baker: The Court will direct me, not you.

The Court: Finish your question.

Mr. Baker: Thank you.

Mr. Baker: May I withdraw it and rephrase it?

The Court: Yes. Thank you.

Q. There was never a deal between you and Hulan Jack, to promote Riverside-Amsterdam because of an obligation that Jack owed Ungar, was there?

A. I never made a deal with anybody in forty years.

Mr. Scotti: Now, please, Mr. Moses, you wait until I interpose my objection, with your Honor's permission. I object to this question, your Honor, [906] on the ground it is not relevant to the issue. We are not trying this defendant for corrupt use of influence or bribery.

The Court: Sustained.

Mr. Baker: That is all, sir.

The Court: Very well. Do you have any redirect?

Mr. Scotti: Yes, your Honor.

Redirect examination.

By Mr. Scotti:

Q. Commissioner, Mr. Baker referred to testimony you gave at the last trial on direct examination. You recall, do you not, that you were cross examined by Mr. Baker at the previous trial? Am I correct?

A. Yes.

[fol. 197] Mr. Baker: May I ask one question more on cross before you start your redirect? I think I extended you that courtesy once before.

Mr. Scotti: Very well.

Mr. Baker: With the Court's permission?

The Court: Yes.

By Mr. Baker:

Q. By the way, Commissioner, you testified before the Grand Jury, did you not?

A. Yes.

Q. And you didn't exercise waiver of immunity, [907] did you?

Mr. Scotti: I object to this question as completely irrelevant and unwarranted.

The Court: Sustained.

Q. Were you given immunity when you testified before the Grand Jury?

Mr. Scotti: Your Honor, I object to this question.

The Court: Sustained.

Mr. Scotti: There was no immunity given in the first place.

Mr. Baker: That's objected to. You want to testify?

Mr. Scotti: Your Honor, I object to the vicious insinuation that this attorney is trying to inject into this line of questioning. It has no place at all in this trial.

The Court: Any further questions, Mr. Baker?

Mr. Baker: That is all.

The Court: Proceed with your redirect, Mr. Scotti.

[fol. 198] Redirect examination.

By Mr. Scotti (Continued):

Q. Now, Commissioner, you were cross examined by defense counsel, were you not, at the previous trial?

[908] A. Yes sir.

Q. Do you recall defense counsel—incidentally, when I say "recall," I don't mean—I am not asking for a specific recollection, I am asking for a general recollection of the subject matter of the question and testimony you gave.

Page 1529 of the previous trial record, do you recall defense counsel putting this question to you:

"Q. Now, there came a time when the District Attorney referred to your testimony before the Grand Jury, and before he referred to the testimony before the Grand Jury he asked you whether or not Borough President Jack said to you that he was obligated to Sidney Ungar. Do you recall that conversation?

"A. Yes.

"Q. Did he say so?" Your answer, "He said he was." Do you recall giving that testimony?

"A. Yes.

"Q. This had to do with the project affecting the public interest, did it not?

"A. What's that?

"Q. Riverside-Amsterdam had to do with a Title I affecting the public interest, did it not?

"A. Yes."

Do you recall this question, or, rather, do you recall that testimony in general?

A. In general, yes.

[909] Q. Now, do you recall this question being put to you by Mr. Baker and your making the answer to it:

"Q. Did you inquire of the Borough President what he meant when he said to you he was obligated?

"A. No, I did not inquire."

Do you recall that testimony?

A. Yes, I do.

[fol. 199] Q. And that was from your own cross examination by defense counsel, Mr. Baker?

A. That's right.

Mr. Scotti: No further questions.

Recross examination.

By Mr. Baker:

Q. May I at this time on redirect examination, sir, ask you if this question was asked you by Mr. Baker on the prior cross examination, if you recall. Page 1529:

"Q. Was it ever suggested to you or did you ever get the impression that the word obligated meant a violation of the public trust?" and your answer was "No"?

A. I recall that distinctly.

Mr. Baker: That is all.

Mr. Scotti: No further questions.

The Court: The witness is excused.

(Witness excused.)

[fol. 200]

AFFIDAVIT OF NO OPINION

State of New York,
County of New York, ss.:

EVE M. PREMINGER, being duly sworn, deposes and says that she is the attorney for the petitioner-appellant herein. No opinion has been rendered by the Court in this case.

EVE M. PREMINGER

Sworn to before me this 24th
day of September, 1962.

John S. Adams, Notary Public, State of New York,
No. 31-0016276, Qualified in New York County,
Commission Expires March 30, 1963.

[fol. 201]

STIPULATION WAIVING CERTIFICATION

It Is Hereby Stipulated, pursuant to Section 170 of the Civil Practice Act, that the foregoing consists of true and correct copies of the Notice of Appeal to the Court of Appeals, the Order Appealed From, and all papers upon which the court below acted in making the Order Appealed From, and the whole thereof, now on file in the office of the Clerk of the County of New York, and certification thereof pursuant to Section 616 of the Civil Practice Act or otherwise is hereby waived.

Dated, New York, September 24, 1962.

Eve M. Preminger, Attorney for Respondent-Appellant.

Frank S. Hogan, Per H. Richard Waller, Attorney for Complainant-Respondent.

[fol. 202].

IN THE COURT OF APPEALS OF THE STATE OF NEW YORK
Present, Hon. Charles S. Desmond, Chief Judge Presiding.

In the Matter of the Application of
SIDNEY J. UNGAR, Appellant,

vs.

HONORABLE JOSEPH A. SARAFITE, Judge of the Court of General Sessions of the County of New York, Respondent,
to review a determination and order of the respondent adjudging petitioner guilty of a criminal contempt of court.

ORDER OF SUBSTITUTION—September 25, 1962

On reading and filing the annexed consent, it is:

Ordered, that Eve M. Preminger be and she hereby is substituted as attorney for the appellant herein in the place and stead of William G. Mulligan, Esq.

Gearon Kimball, Deputy Clerk.

Seal of the Court of Appeals, State of New York.

[fol. 203]

IN THE COURT OF APPEALS OF THE STATE OF NEW YORK
State of New York, ss.:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 28th day of February, in the year of our Lord one thousand nine hundred and sixty-three, before the Judges of said Court.

Witness, The Hon. Charles S. Desmond, Chief Judge, Presiding.

Raymond J. Cannon, Clerk.

In the Matter of the Application of
SIDNEY J. UNGAR, Appellant,

vs.

HONORABLE JOSEPH A. SARAFITE, Judge of the Court of General Sessions of the County of New York, Respondent,
to review a determination, etc.

REMITTITUR—February 28, 1963

Be It Remembered, That on the 25th day of September in the year of our Lord one thousand nine hundred and sixty-two, Sidney J. Ungar, the appellant in this cause, came here unto the Court of Appeals, by William G. Mulligan, his attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial [fol. 204] Department. And Honorable Joseph A. Sarafite, Judge of the Court of General Sessions, the respondent—in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, is hereto annexed.

Whereupon, the said Court of Appeals, this cause having heard this case argued by Miss Eve M. Preminger, counsel for the appellant—and by Mr. H. Richard Uviller of counsel for the respondent, brief filed by amicus curiae and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby are affirmed without costs. (See *Matter of Ungar*, decided herewith.)

And it is also further ordered, that the record aforesaid, and the proceeding in this Court, be remitted to the Appellate Division of the Supreme Court, First Judicial Department, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed without costs, etc., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the order of the Court of Appeals aforesaid, by it given in the premises, are by the said Court

of Appeals remitted into the Appellate Division of the Supreme Court, First Judicial Department, before the Justices thereof, according to the form of the statute in such [fol. 205] case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division, before the Justices thereof, &c.

Raymond J. Cannon, Clerk of the Court of Appeals
of the State of New York.

Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 206]

IN THE COURT OF APPEALS OF THE STATE OF NEW YORK
State of New York, ss.:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 28th day of February, in the year of our Lord one thousand nine hundred and sixty-three, before the Judges of said Court.

Witness, The Hon. Charles S. Desmond, Chief Judge,
Presiding.

Raymond J. Cannon, Clerk.

No. 367

In the Matter of the Criminal Contempt of

SIDNEY J. UNGAR, Appellant,

HONORABLE JOSEPH A. SARAFITE, Judge of the Court of
General Sessions, Respondent.

REMITTITUR—February 28, 1963

Be It Remembered, That on the 25th day of September in the year of our Lord one thousand nine hundred and sixty-two, Sidney J. Ungar, the appellant—in this cause, came here unto the Court of Appeals, by William G. Mulligan, his attorney and filed in the said court a Notice of

Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial [fol. 207] Department. And Honorable Joseph A. Sarafite, Judge of the Court of General Sessions, the respondent—in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Miss Eve M. Preminger of counsel for the appellant—, and by Mr. H. Richard Uyiller of counsel for the respondent, brief filed by amicus curiae and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed without costs. However, we point out that where the alleged contempt consists of the making of charges of wrongdoing by the trial judge himself he should, where disposition of the contempt charge can be withheld until after the trial and where it is otherwise practicable, order the contempt proceeding to be tried before a different judge.

And it was also further ordered, that the records aforesaid, and the proceeding in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed, without costs, &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court [fol. 208] of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

Raymond J. Cannon, Clerk of the Court of Appeals
of the State of New York.

Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 209]

IN THE COURT OF APPEALS OF THE STATE OF NEW YORK

In the Matter of the Criminal Contempt of
 SIDNEY J. UNGAR, Respondent-Appellant,
 HONORABLE JOSEPH A. SARAFITE, Judge of the
 Court of General Sessions, Claimant-Respondent.

In the Matter of the Application of
 SIDNEY J. UNGAR, Petitioner-Appellant,
 against

HONORABLE JOSEPH A. SARAFITE, Judge of the Court of
 General Sessions of the County of New York, Respon-
 dent-Respondent,

to review a determination and order of the respondent
 adjudging petitioner guilty of a criminal contempt of
 court.

NOTICE OF MOTION FOR REARGUMENT OR IN THE ALTERNATIVE
 TO AMEND REMITTITUR—March 25, 1963

Please Take Notice that upon the annexed brief and upon all of the papers upon which the appeal in the above-entitled action was heard and decided by this Court, to wit: the Record on Appeal and the briefs of the parties, and upon the opinion and order of this Court made on the 8th [fol. 210] day of March, 1963, in which this Court affirmed the order of the Appellate Division affirming the Mandate of Order of Conviction, and upon all of the proceedings heretofore had herein, respondent-appellant will move this Court at a term thereof, to be held at the Court of Appeals Hall, in the City of Albany, on the next motion day in March, 1963, at 2 o'clock in the afternoon of that day, for an order granting reargument on the appeal herein; or in the alternative, for an order amending the remittitur in the above-entitled action by adding thereto the following:

(1) Upon the appeal herein there was presented and necessarily passed upon the following federal questions:

(a) a question under the Constitution of the United States, viz.: whether the trial judge's failure to apply Rule VII of the Court of General Sessions, requiring an adjournment upon proof of engagement of counsel, constituted a denial of appellant's right to counsel and a denial of due process in violation of the Fourteenth Amendment;

(b) whether the refusal of the trial judge to grant a one-hour adjournment to permit appellant to introduce evidence in his behalf constituted a denial of due process in violation of the Fourteenth Amendment;

(c) whether the fact that a judge who is himself charged with wrongdoing presides at the contempt hearing on such charges constitutes a denial of due process in violation of the Fourteenth Amendment;

(d) whether Section 751 of the Judiciary Law, as interpreted by the Court in this case, contravenes the due process clause of the Fourteenth Amendment in that it pro-[fol. 211] vides for summary punishment 7 days after the end of the trial during which the alleged contempt was uttered;

(e) whether Section 751 of the Judiciary Law, as interpreted by the Court in this case, contravenes the due process clause of the Fourteenth Amendment in that it permits a judge who is personally attacked and who determines that there is no necessity for summary punishment at the time of the alleged contempt to preside at a subsequent summary hearing on the contempt charges;

(f) whether this Court, in writing an opinion stating that "where the alleged contempt consists of the making of charges of wrongdoing by the trial judge himself, he should . . . order the contempt proceeding to be tried before a different judge," yet nevertheless affirming a conviction where the alleged contempt consisted of the making of charges of wrongdoing by the trial judge, deprived appel-

lant of the right to equal protection of the laws in violation of the Fourteenth Amendment.

Dated: New York, N. Y., March 25, 1963.

Yours, etc.,

Eve Preminger, Attorney for Respondent-Appellant,
711 5th Avenue, New York, N. Y.

To: Hon. Frank S. Hogan, District Attorney of New York County, Attorney for Respondent-Respondent, 155 Leonard St., New York, N. Y.

[fol. 212]

IN THE COURT OF APPEALS OF THE STATE OF NEW YORK

In the Matter of the Criminal Contempt of
SIDNEY J. UNGAR, Respondent-Appellant,

HONORABLE JOSEPH A. SARAFITE, Judge of the
Court of General Sessions, Claimant-Respondent.

In the Matter of the Application of
SIDNEY J. UNGAR, Petitioner-Appellant,
against

HONORABLE JOSEPH A. SARAFITE, Judge of the Court of
General Sessions of the County of New York, Respondent-Respondent,

to review a determination and order of the respondent
adjudging petitioner guilty of a criminal contempt of
court.

BRIEF FOR APPELLANT—March 25, 1963

Statement

This is a motion for an order permitting reargument of the appeal herein or, in the alternative, for an order

amending the remittitur to show that certain federal questions were raised on this appeal and in this motion.

[fol. 213] The central issue on this appeal was whether the trial judge's use of summary procedure to punish an alleged contempt was lawful when exercised one week after the main trial had ended and eighteen days after the alleged contempt was uttered. Such exercise resulted in denying appellant:

- (a) his right to counsel;
- (b) his right to produce evidence; and
- (c) his right to a hearing before a judge other than the one he had accused of wrongdoing.

It was appellee's position that summary procedure under the relevant statutes was nevertheless appropriate. Appellant took the position that the existing statutes fairly construed forbade this procedure and that such construction was required if appellant was not to be denied his rights under the Federal and State Constitutions to a fair trial and due process.

Appellant also asserted that independent of the statutes the procedure followed deprived him of these basic constitutional rights.

The trial court held that it was not proceeding summarily but adopting the procedure prescribed by the statute for a contempt committed outside the presence of the court (fols. 155-56). Therefore, in addition to bringing an Article 78 proceeding to review the contempt conviction, appellant appealed from the Mandate of Conviction.

The Appellate Division dismissed the appeal and affirmed the conviction in the Article 78 proceeding, thereby disagreeing with the trial court's interpretation of the procedure followed. The Appellate Division rendered no opinion.

This Court affirmed the order dismissing the appeal, thereby agreeing with the Appellate Division that the summary procedure was proper and that the instant case was [fol. 214] a summary proceeding. However, this Court did suggest in its brief memorandum decision that in cases of this type summary procedures should not be used.

The above action of this Court justifies reargument because (1) it has now construed the statute as authorizing summary procedure after the conclusion of the trial; (2) that construction raises various questions regarding the constitutionality of the statute which on its face appears to be valid; (3) this Court's admonition as to the required procedure henceforth to be followed in similar cases raises for the first time a question of equal protection of the laws.

The reargument sought is limited to the issue arising because of this Court's decision—namely, whether the statute as thus construed is constitutional.

In the event that reargument is denied, it is respectfully requested that the remittitur be amended to encompass the constitutional question of due process hitherto raised and those raised by the decision as above noted.

Section 751 of the Judiciary Law, as Construed and Applied to Appellant in this Case, Deprives Appellant of the Right to Due Process Guaranteed by the Fourteenth Amendment

Section 751 of the Judiciary Law provides in relevant part:

"751. Punishment for criminal contempts. . . . a contempt, committed in the immediate view and presence of the court, may be punished summarily; when not so committed, [fol. 215] the party charged must be notified of the accusation, and have a reasonable time to make a defense."

The above statute contains no express time limitation on the exercise of the drastic remedy of summary punishment. It is the only instance in our law where a man may be convicted without an opportunity to be heard in his defense, to cross-examine witnesses, to present testimony, and to be represented by counsel. It is appellant's contention that the statute, in order to be constitutional, must be read to contain a limitation on the exercise of summary power coequal to the need therefor. Mr. Justice Holmes stated in his dissent in *Toledo Newspaper Co. v. U. S.*, 247 U. S. 402, 425 (1917):

"I would go as far as any man in favor of the sharpest and most summary enforcement of order in Court and obedience to decrees, but when there is no need for im-

mediate action contempts are like any other branch of law and should be dealt with as the law deals with other illegal acts."

Prior to the instant case, Section 751 had never been construed by any court to permit the use of the summary procedure after the conclusion of the trial during which the alleged contempt was uttered. In the federal courts, Rule 42 of the Federal Rules of Criminal Procedure contains provisions similar to Section 751 for the punishment of criminal contempts. Section (a) of Rule 42 outlines the summary procedure. Although no court has construed these provisions to permit summary judgment after the conclusion of the trial, in *Sacher v. U. S.*, 343 U. S. 1 (1952) [vol. 216] the Supreme Court outlined the occasions where the summary power granted by Rule 42(a) could be extended from the moment of the utterance of the alleged contempt to the conclusion of the trial. The majority opinion stated that where there were compelling reasons of fairness to the accused "if [the judge] believes the exigencies of the trial require that he defer judgment until its completion he may do so without extinguishing his power" (343 at 11). No suggestion was made that this procedure would be followed in all cases or that the summary power could be further extended until after the actual conclusion of the trial.

It may be noted that the delay in exercising the summary power in that case was required by compelling reasons of fairness to the accused, in that case the clients of the contemnors. But no compelling considerations apply in the case of a witness such as appellant. Witnesses are frequently punished for contempt during the principal trial without effect upon either the prosecution or the defense.

In *Offut v. U. S.*, 348 U. S. 11 (1954) the alleged contempt consisted of charges of wrongdoing against the sitting judge. Stating that he was relying on the *Sacher* case, that judge attempted to use his summary power to punish the defendant's lawyer for contempt after the alleged contempt but before the conclusion of the trial. The Supreme Court held that Rule 42(a) could not be construed to permit such summary punishment in a case of a personal attack upon the trial judge, stating that "the fair adminis-

tration of justice," 343 U. S. at 17, required a plenary hearing before another judge. (See also: *Offut v. U. S.*, 232 Fed. 2d 69 (D. C. Cir., 1956).)

The instant case concededly involved a personal attack upon the trial judge and is therefore indistinguishable from the *Offut* case. Yet this Court construed Section 751 [fol. 217] of the Judiciary Law in a manner directly contrary to the Supreme Court's construction in *Offut* of the similar federal rule. No explanation was given by this Court for this opposite construction other than its statement herein, apparently in agreement with the *Offut* decision that, "where the alleged contempt consists of the making of charges of wrongdoing by the trial judge himself he should, where disposition of the contempt charge can be withheld until after the trial and where it is otherwise practicable, order the contempt proceeding to be tried before a different judge."

Conclusion

It is respectfully submitted that reargument should be granted or, in the alternative, the remittitur should be amended to show the federal questions described herein.

Respectfully submitted,

Eve M. Preminger, Attorney for Appellant.

March 25, 1963.

[fol. 218]

IN THE COURT OF APPEALS OF THE STATE OF NEW YORK

Present, Hon. Charles S. Desmond, Chief Judge, presiding.

Mo. No. 287

In the Matter of the Application of

SIDNEY J. UNGAR, Appellant,

vs.

HONORABLE JOSEPH A. SARAFITE, Judge of the Court of
General Sessions of the County of New York, Respondent,

to review a determination &c.

ORDER AMENDING REMITTITUR—April 4, 1963

A motion to amend the remittitur in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

Ordered, that the said motion be and the same hereby is granted. The return of the remittitur is requested and, when returned, it will be amended by adding thereto the following:

Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz: Whether the rights of the appellant to due process under the Fourteenth Amendment to the Constitution of the United States were violated. The appellant argued that such rights were violated by (1) the trial judge's refusal to grant an adjournment of the contempt proceeding upon proof of the engagement of his counsel; (2) the trial judge's invoking of summary power under §751 of the Judiciary Law seven days after the end of the trial during which the contempt was committed, and (3) the same trial judge's presiding in the resulting contempt proceeding even though he was the judge "personally attacked".

The Court of Appeals held that appellant's contemptuous remarks were not a personal attack upon the trial judge, and that in no way was there a denial of any constitutional rights of appellant.

And the Supreme Court of New York County is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

Georron Kimball, Deputy Clerk.

[fol. 219]

IN THE COURT OF APPEALS OF THE STATE OF NEW YORK

Present, Hon. Charles S. Desmond, Chief Judge, presiding.

Mo. No. 287

In the Matter of the Criminal Contempt of

SIDNEY J. UNGAR, Appellant,

HONORABLE JOSEPH A. SARAFITE, Judge of the Court of General Sessions, Respondent.

ORDER AMENDING REMITTITUR—April 4, 1963

A motion to amend the remittitur in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

Ordered, that the said motion be and the same hereby is granted. The return of the remittitur is requested and, when returned, it will be amended by adding thereto the following:

Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz: Whether the rights of the appellant to due process under the Fourteenth Amend-

ment to the Constitution of the United States were violated. The appellant argued that such rights were violated by (1) the trial judge's refusal to grant an adjournment of the contempt proceeding upon proof of the engagement of his counsel; (2) the trial judge's invoking of summary power under §751 of the Judiciary Law seven days after the end of the trial during which the contempt was committed, and (3) the same trial judge's presiding in the resulting contempt proceeding even though he was the judge "personally attacked".

The Court of Appeals held that appellant's contemptuous remarks were not a personal attack upon the trial judge, and that in no way was there a denial of any constitutional rights of appellant.

And the Appellate Division, First Judicial Department, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

Gearon Kimball, Deputy Clerk.

[fol. 220]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

In the Matter of the Application of

SIDNEY J. UNGAR, Appellant,

against

HONORABLE JOSEPH A. SARAFITE, Judge of the Court of General Sessions of the County of New York, Appellee; to review a determination and order of the respondent adjudging petitioner guilty of a criminal contempt of court.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed May 22, 1963

SIR:

I. Notice is hereby given that Sidney J. Ungar hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of New York, dated February 28, 1963, which affirmed the order of this court dated and entered the 3rd day of April, 1962, affirming the determination by the Appellee dated December 13, 1960.

This appeal is taken pursuant to 28 U.S.C. Section 1257 (2). Appellant was convicted of contempt of court and was sentenced to 10 days imprisonment and to pay a fine of \$250.00. Appellant is not now in custody.

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States and include in said transcript, the following:

- (1) This Notice of Appeal and proof of service thereof;
- (2) The Remittitur of the Court of Appeals;
- [fol. 221] (3) The order dated the 4th day of April, 1962 amending said Remittitur; and
- (4) The Record on Appeal filed in the Court of Appeals.

III. The following questions are presented by this appeal:

1. Is Section 750 of the Judiciary Law of the State of New York on its face, as construed and as applied, unconstitutional in that it violates the due process clause of the Fourteenth Amendment to the Constitution of the United States?

2. Is Section 751 of the Judiciary Law of the State of New York as construed and as applied, unconstitutional in that it violates the due process clause of the Fourteenth Amendment to the Constitution of the United States?

3. Was appellant, a lawyer since 1935, denied due process of law, when he was tried for contempt of court by the same judge who accused him of the crime?

4. Was appellant denied due process of law when he was tried and adjudged in contempt of court by said judge on December 13, 1960, 18 days after the incident of contempt and 7 days after the conclusion of the trial at which the incident occurred?

5. Was appellant denied due process of law at the said hearing on December 13, 1960 when the said trial judge in violation of the Rules of his court, refused the appellant and his counsel a reasonable adjournment of said hearing to enable him to prepare against such charges, considering in this question that the only indication and notice of the contempt proceeding was given by service of an order to show cause late Thursday afternoon, December 8, 1960 returnable the following Tuesday morning, December 13, 1960, with Saturday and Sunday intervening, during which [fol. 222] a 17" snowstorm visited New York, paralyzing traffic on Monday and considering also that the appellant made claim in good faith that the alleged contemptuous words were true, but were unintentionally uttered as a result of the emotional pressures created by the judge in three consecutive court days on the witness stand at a trial in which he, a lawyer, although not a defendant and denied counsel to protect his rights, was the subject of attack as a conspirator in the charges on trial?

6. Was appellant denied due process of law in that he was adjudged in contempt of court for having made the following statement while a witness at the trial under the following circumstances:

"I am absolutely unfit to testify because of your Honor's attitude and conduct towards me. I am being coerced and intimidated and badgered. The Court is suppressing the evidence."

The appellant had been on the witness stand on November 22, 23, 1960 and on the latter day he made the foregoing remark (which according to the appellee's notice of motion forms the basis of the contempt charge). And the further circumstances are that immediately preceding the remark, the appellant had repeatedly and respectfully pleaded with the judge that he was emotionally upset and that he be given a recess to enable him to compose himself, verified by the fact that during a recess subsequently called, appellant had medical assistance and continued as a witness to completion of his testimony without further incident.

7. Was appellant denied due process of law in being tried for contempt by said judge who was hostile toward him from the inception of his role as a witness?

8. Was appellant denied due process of law in being tried for contempt by the judge who was personally involved and against whom appellant had made personal attacks?

[fol. 223] 9. Was appellant denied due process of law by the failure of the Court of Appeals to decide this case in appellant's favor, although it held that in a contempt proceeding, where disposition of the contempt charge of wrongdoing by the trial judge can be withheld until after the trial, the accused should be tried before another judge?

Dated, New York, New York, May 20, 1963.

Emanuel Redfield, Attorney for Appellant, Office &
P. O. Address, 60 Wall Street, New York 5, New
York.

To: Frank S. Hogan, Esq., Attorney for Appellee, 155 Leonard Street, New York 13, New York.

Clerk, Appellate Division, First Department.

[fol. 223a] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 224] Acknowledgment of service (omitted in printing).

[fol. 225] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Criminal Contempt of
SIDNEY J. UNGAR, Appellant,
—against—

HONORABLE JOSEPH A. SARAFITE, Judge of the Court of
General Sessions, Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE
UNITED STATES—Filed May 23, 1963

SIR :

I. Notice is hereby given that Sidney J. Ungar hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of New York, dated February 28, 1963, which affirmed the order of the Appellate Division, First Department, dated and entered the 3rd day of April, 1962, which dismissed the appeal taken to that court from the order and judgment made and entered on the 13th day of December, 1960 by the Court of General Sessions in the County of New York.

This appeal is taken pursuant to 28 U.S.C. Section 1257 (2). Appellant was convicted of contempt of court and

was sentenced to 10 days imprisonment and to pay a fine of \$250.00. Appellant is not now in custody.

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States and include in said transcript, the following:

- (1) This Notice of Appeal and proof of service thereof;
- (2) The Remittitur of the Court of Appeals;
- [fol. 226] (3) The order of the Court of Appeals dated the 4th day of April, 1962 amending said Remittitur; and
- (4) The Record on Appeal filed in the Court of Appeals.

III. The following questions are presented by this appeal:

1. Is Section 750 of the Judiciary Law of the State of New York on its face, as construed and as applied, unconstitutional in that it violates the due process clause of the Fourteenth Amendment to the Constitution of the United States?

2. Is Section 751 of the Judiciary Law of the State of New York, as construed and as applied, unconstitutional in that it violates the due process clause of the Fourteenth Amendment to the Constitution of the United States?

3. Was appellant, a lawyer since 1935, denied due process of law, when he was tried for contempt of court by the same judge who accused him of the crime?

4. Was appellant denied due process of law when he was tried and adjudged in contempt of court by said judge on December 13, 1960, 18 days after the incident of contempt and 7 days after the conclusion of the trial at which the incident occurred?

5. Was appellant denied due process of law at the said hearing on December 13, 1960 when the said trial judge in violation of the Rules of his court, refused the appellant

and his counsel a reasonable adjournment of said hearing to enable him to prepare against such charges, considering in this question that the only indication and notice of the contempt proceeding was given by service of an order to show cause late Thursday afternoon, December 8, 1960 [fol. 227] returnable the following Tuesday morning, December 13, 1960, with Saturday and Sunday intervening, during which a 17" snowstorm visited New York, paralyzing traffic on Monday and considering also that the appellant made claim in good faith that the alleged contemptuous words were true, but were unintentionally uttered as a result of the emotional pressures created by the Judge in three consecutive court days on the witness stand at a trial in which he, a lawyer, although not a defendant and denied counsel to protect his rights, was the subject of attack as a conspirator in the charges on trial?

6. Was appellant denied due process of law in that he was adjudged in contempt of court for having made the following statement while a witness at the trial under the following circumstances:

"I am absolutely unfit to testify because of your Honor's attitude and conduct towards me. I am being coerced and intimidated and badgered. The Court is suppressing the evidence."

The appellant had been on the witness stand on November 22, 23, 25, 1960 and on the latter day he made the foregoing remark (which according to the appellee's notice of motion forms the basis of the contempt charge). And the further circumstances are that immediately preceding the remark, the appellant had repeatedly and respectfully pleaded with the judge that he was emotionally upset and that he be given a recess to enable him to compose himself, verified by the fact that during a recess subsequently called, appellant had medical assistance and continued as a witness to completion of his testimony without further incident.

[fol. 228] 7. Was appellant denied due process of law in being tried for contempt by said judge who was hostile toward him from the inception of his role as a witness?

8. Was appellant denied due process of law in being tried for contempt by the judge who was personally involved and against whom appellant had made personal attacks?

9. Was appellant denied due process of law by the failure of the Court of Appeals to decide this case in appellant's favor, although it held that in a contempt proceeding, where disposition of the contempt charge of wrongdoing by the trial judge can be withheld until after the trial, the accused should be tried before another judge?

Dated, New York, New York, May 20, 1963.

Emanuel Redfield, Attorney for Appellant, Office &
P. O. Address, 60 Wall Street, New York 5, New
York.

To: Frank S. Hogan, Esq., Attorney for Appellee, 155
Leonard Street, New York 13, New York.

Clerk, Supreme Court of the State of New York, County
of New York.

[fol. 229] Acknowledgment of service (omitted in printing).

[fol. 230] Clerk's Certificate to foregoing transcript
(omitted in printing).

[fol. 231]

SUPREME COURT OF THE UNITED STATES

No. 167—October Term, 1963

SIDNEY J. UNGAR, Appellant,

VS.

HONORABLE JOSEPH A. SARAFITE, Judge, etc.

- ORDER NOTING PROBABLE JURISDICTION—October^o14, 1963
Appeal from the Court of Appeals of the State of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

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JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1962

No. ~~150~~ 167

SIDNEY J. UNGAR,

Appellant,

against

HONORABLE JOSEPH A. SARAFITE, Judge of the
Court of General Sessions of the County of New York,
Appellee.

STATEMENT AS TO JURISDICTION

EMANUEL REDFIELD,
Counsel for Appellant,
60 Wall Street,
New York 5, New York.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1962

No.

SIDNEY J. UNGAR,

Appellant,

against

HONORABLE JOSEPH A. SARAFITE, Judge of the Court of
General Sessions of the County of New York,
Appellee.

STATEMENT AS TO JURISDICTION

Pursuant to Rule 15 of the Revised Rules, the appellant files this single jurisdictional statement, covering the review of two judgments of the Court of Appeals of the State of New York, both dated and entered February 28, 1963. This statement is filed singly, because both cases involve identical questions relating to the punishment of the appellant for a single contempt of court. Two proceedings covering the same subject matter were necessitated by uncertainty in the remedy for reviewing an order in a contempt proceeding.

In one case, entitled, "In the Matter of Criminal Contempt etc.", the petitioner appealed to the Appellate Division of the Supreme Court of the State of New York from the trial court's Mandate of Order and Judgment of Conviction, dated December 13, 1960. This appeal was

dismissed by the Appellate Division on April 3, 1962. Its order was affirmed by the Court of Appeals of the State of New York.

In the other case, entitled, "In the Matter of the Application of SIDNEY UNGAR * * * to review a determination, etc.", the petitioner commenced an original and separate proceeding in the Appellate Division to review the aforesaid Mandate of Order and Judgment. The Appellate Division affirmed said Order and Judgment on April 3, 1962. The Court of Appeals affirmed the order of the Appellate Division.

Opinions Below

The Court of Appeals did not write an opinion, but in both its remittiturs (Appendix B and BB herein, pages 6a, 9a) that court made the following significant observation, pertinent to the issues raised here:

"However, we point out that where the alleged contempt consists of the making of charges of wrongdoing by the trial judge himself, he should; where disposition of the contempt charge can be withheld until after trial, and where it is otherwise practicable, order the contempt proceeding to be held before a different judge."

The Appellate Division did not render any opinion in either proceeding.

The trial term wrote no opinion.

Jurisdiction

(i) The nature of the proceeding was one to punish the appellant for contempt of court, pursuant to Sections 750, 751 and 752 of the Judiciary Law of the State of New York.

(ii) The judgments of affirmance by the New York Court of Appeals were made and entered in both cases on February 28, 1963.

A motion to amend the remittitur was made in the Court of Appeals of the State of New York and was granted, and an order to that effect was entered on April 4, 1963. The order directed that the remittitur be amended to read as follows:

"Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: Whether the rights of the appellant to due process under the Fourteenth Amendment to the Constitution of the United States were violated. The appellant argued that such rights were violated by (1) the trial judge's refusal to grant an adjournment of the contempt proceeding upon proof of the engagement of his counsel; (2) the trial judge's invoking of summary power under §751 of the Judiciary Law seven days after the end of the trial during which the contempt was committed, and (3) the same trial judge's presiding in the resulting contempt proceeding even though he was the judge 'personally attacked'. The Court of Appeals held that appellant's contemptuous remarks were not a personal attack upon the trial judge, and that in no way was there a denial of any constitutional rights of appellant."

A notice of appeal to this Court was filed in the Supreme Court of the State of New York, Appellate Division, First Department on May 22, 1963 and another Notice of Appeal to this Court was filed in the Supreme Court of the State of New York, County of New York on May 23, 1963. The Notices of Appeal were from the respective courts. The Supreme Court of the State of New York is the successor to the Court of General Sessions.

(iii) The jurisdiction of this court is conferred by 28 U.S.C. §1257(2).

(iv) The following decisions sustain the jurisdiction of the Supreme Court to review the judgments on direct appeal in this case: *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282; *Whitney v. Calif.*, 270 U. S. 357, 360; *Louisville & Nashville R. Co. v. Higdon*, 234 U. S. 592, 598; *New York ex rel. Bryant v. Zimmerman*, 278 U. S. 63, 67; *Brinkerhoff-Faris v. Hill*, 281 U. S. 673, 677; *Cantwell v. Connecticut*, 309 U. S. 626; *Raley v. Ohio*, 360 U. S. 423, 434-6.

Questions Presented

1. Is Section 750 of the Judiciary Law of the State of New York on its face, as construed and as applied, unconstitutional in that it violates the due process clause of the Fourteenth Amendment to the Constitution of the United States?

2. Is Section 751 of the Judiciary Law of the State of New York as construed and as applied unconstitutional in that it violates the due process clause of the Fourteenth Amendment to the Constitution of the United States?

3. Was appellant, a lawyer since 1935, denied due process of law, when he was tried for contempt of court by the same judge who accused him of the crime?

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5. Was appellant denied due process of law at the said hearing on December 13, 1960 when the said trial

judge in violation of the Rules of his court, refused the appellant and his counsel a reasonable adjournment of said hearing to enable him to prepare against such charges, considering in this question that the only indication and notice of the contempt proceeding was given by service of an order to show cause late Thursday afternoon, December 8, 1960 returnable the following Tuesday morning, December 13, 1960, with Saturday and Sunday intervening, during which a 17" snowstorm visited New York, paralyzing traffic on Monday and considering also that the appellant made claim in good faith that the alleged contemptuous words were true, but were unintentionally uttered as a result of the emotional pressures created by the judge in three consecutive court days on the witness stand at a trial in which he, a lawyer, although not a defendant and denied counsel to protect his rights, was the subject of attack as a conspirator in the charges on trial?

6. Was appellant denied due process of law in that he was adjudged in contempt of court for having made the following statement while a witness at the trial under the following circumstances:

"I am absolutely unfit to testify because of your Honor's attitude and conduct towards me. I am being coerced and intimidated and badgered. The Court is suppressing the evidence."

The appellant had been on the witness stand on November 22, 23, 25, 1960 and on the latter day he made the foregoing remark (which according to the appellee's notice of motion forms the basis of the contempt charge). And the further circumstances are that immediately preceding the remark, the appellant had repeatedly and respectfully pleaded with the judge that he was emotion-

ally upset and that he be given a recess to enable him to compose himself, verified by the fact that, during a recess subsequently called, appellant had medical assistance and continued as a witness to completion of his testimony without further incident.

7. Was appellant denied due process of law in being tried for contempt by said judge who was hostile toward him from the inception of his role as a witness?

8. Was appellant denied due process of law in being tried for contempt by the judge who was personally involved and against whom appellant made personal attacks.

9. Was appellant denied due process of law by the failure of the Court of Appeals to decide this case in appellant's favor, although it held that in a contempt proceeding, where disposition of the contempt charge of wrongdoing by the trial judge can be withheld until after the trial, the accused should be tried before another judge?

Statutes Involved

Section 750 Judiciary Law of New York (McKinney's "Consolidated Laws of New York Annotated"): "Power of courts to punish for criminal contempts

"A. A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts, and no others:

"1. Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority. * * *

Section 751 of the Judiciary Law, insofar as pertinent herein, provides:

•§751. Punishment for criminal contempts

• "Punishment for a contempt, specified in section seven hundred and fifty, may be by fine, not exceeding two hundred and fifty dollars, or by imprisonment, not exceeding thirty days, in the jail of the county where the court is sitting, or both, in the discretion of the court. • • •

• "such a contempt, committed in the immediate view and presence of the court, may be punished summarily; when not so committed, the party charged must be notified of the accusation, and have a reasonable time to make a defense."

Section 752. Requisites of commitment for criminal contempt; review of certain mandates

• "Where a person is committed for contempt, as prescribed in section seven hundred fifty-one, the particular circumstances of his offense, must be set forth in the mandate of commitment. Such mandate punishing a person summarily for a contempt committed in the immediate view and presence of the court, is reviewable by a proceeding under article seventy-eight of the civil practice act."

Statement

The appellant, who has been a lawyer in New York since 1935, was convicted by appellee of a criminal contempt of court on December 13, 1960 under Sections 750 and 751 of the Judiciary Law of the State of New York in that on November 25, 1960 in open court "in a loud, angry, disorderly, contemptuous and insolent tone directly tending to interrupt the proceedings of the court and to impair the respect due to the authority of the

court," he made the following outburst while on the witness stand, where he had been for the third consecutive day:

"I am absolutely unfit to testify because of your Honor's attitude and conduct towards me. I am being coerced and intimidated and badgered. The court is suppressing the evidence."

The contempt proceeding was commenced by an order to show cause which stated, "Why he should not be punished for criminal contempt of court, committed on November 25, 1960, as hereinafter specified" (261-262).^{*} The specification thereafter appears in the language just quoted (356-357).

The order and judgment of conviction confirms that the utterances on November 25, 1960 were the sole charge of contempt (168);

"ORDERED AND ADJUDGED, that Sidney J. Ungar be and hereby is found guilty of criminal contempt of court committed on November 25, 1960, during the November 1960 Term continued, he having committed the acts hereinabove recited, and having shouted at the Court, 'I am being coerced and intimidated. The court is suppressing the evidence,' while said Court was in session, and in the immediate view, hearing and presence of the jury, by conduct which was wilfully contemptuous and insolent, and in a manner directly tending to interrupt the proceedings of the Court and to impair the authority due to it." ^a

But this is not the full and complete state of facts, because it does not show the circumstances under which

^{*} Except where otherwise noted, numerals used refer to folios in the Record on Appeal of the case entitled, "In the Matter of the Application of SIDNEY J. UNGAR, etc., to review a determination, etc."

the statement was made. To complete the facts, it is necessary that the events prior to the incident be shown:

On January 20, 1960 an indictment was filed against one, Hulan Jack, charging him with obstructing justice in conspiracy with appellant. It further charged that Jack in breach of law accepted gifts or loans from appellant. Appellant was subpoenaed as a witness and testified for many days. A disagreement of the jury followed. A second trial was held during which the appellant was again a witness on behalf of the prosecution. He testified for four court days, November 22, 23, 25 and 28, 1960. It was during the testimony on the 25th after great emotional strain resulting from the hostile attitude of the Court and of both counsel toward appellant, and the accusation against him that he was a co-conspirator, that the momentary outburst, the subject of the contempt proceeding, occurred.

The appellee presided as trial justice at both trials. He was evidently vexed with appellant because he was under the impression that appellant had been responsible for the disagreement of the jury at the first trial. Appellant, who was the subject of attack, of publicity and consequent damage to reputation, felt that the whole story was not being brought out by the district attorney nor by defendant's counsel, and that the appellee because of his hostility to appellant was preventing the testimony from being fully developed by him (419-420; 108-135; 126-131; 190-203; 216; 220, 225, 265-271, 329, 332-341; 362).

Although the words were blurted out by appellant unintentionally by reason of the emotional stress, appellant nevertheless believed, and still believes that he was being badgered and was prevented from fully testifying as to the relationship and transaction with Jack as narrated in the Record on Appeal (53-107). His testimony

would have disclosed that the transaction, which formed the basis of the charges against Jack, if properly and fully developed was completely innocent.

Prior to the incident of contempt the district attorney wrestled with appellant over questions which appellant could not understand and others which appellant felt he could not answer. This, however, did not please appellee (194-203, 206, 207, 210, 213, 219, 225-231).

Then the following ensued (233):

"The Witness: If your Honor please, I want to recess at this point. I can't testify. I am too upset, and I am much too nervous. And I can't testify under these circumstances. I am not being a voluntary witness. I am being pressured and coerced and intimidated into testifying, and I can't testify under these circumstances.

* * * * *

The Witness: I can't testify, your Honor. I am shaking all over. And I must have a recess, I just am absolutely a bundle of nerves at this point, and I don't know what I'm doing or saying any more.

I ask for the privilege of leaving the stand, your Honor.

The Court: No, you will remain on the stand.

The Witness: I can't testify, I'm sorry, your Honor. I am not in any physical or mental condition to testify.

The Court: Mr. Witness, no one asked you anything. Nobody is questioning you. You are not testifying. We have taken a recess for about three minutes of silence, and we will take a few more minutes.

The Witness: I would like to leave the stand, your Honor.

The Court: No, you may not leave the stand. ▽

The Court: Proceed, Mr. Scotti.

The Witness: I am not going to answer questions, your Honor. I am not going to testify in this confusion, and the Court nor anyone else will make me testify in this emotional state. I am absolutely unfit to testify because of your Honor's attitude and conduct towards me. I am being coerced and intimidated and badgered. The Court is suppressing the evidence.

The Court: You are not only contemptuous but disorderly and insolent.

The Witness: I have asked for the privilege of leaving the stand for five minutes.

The Court: Put your question, Mr. Scotti.

Mr. Baker: May I renew my motion?

The Court: The motion is denied.

Mr. Baker: Exception.

Q. Mr. Ungar, did you tell Mr. Jack that Saturday morning that there was a conflict between your story to me and Mr. Bechtel's story to me? A. I can't answer any questions. I am not even concentrating on what you are saying. I can't even think clearly at this minute any more.

The Court: Do you refuse to answer?

The Witness: I don't know what he is talking about, Judge. I am an emotional wreck at this time. I am asking for a recess. I ask the right to get off this stand so that I can contain myself.

The Court: Do you refuse to answer the question, Mr. Ungar?

The Witness: I said I can't answer the question, your Honor.

The Court: Put the question, Mr. Reporter:

Mr. Scotti: Mr. Reporter, read the question.

(The question was read by the Court Stenographer as follows:

'Q: Mr. Ungar, did you tell Mr. Jack that Saturday morning that there was a conflict between your story to me and Mr. Bechtel's story to me?')

The Court: Let the record show that the defendant has remained silent and has not answered the question for four minutes.

Mr. Scotti: You mean the witness, your Honor.

The Court: What did I say?

Mr. Scotti: The defendant.

The Court: Obviously I meant the witness. Very well, we will advance our luncheon recess.

Do not discuss the case, ladies and gentlemen, do not form or express any opinion as to the guilt or innocence of this defendant until the case is finally submitted to you. Since we are advancing the hour when we start our luncheon recess, we will get back here at 1:45. You may retire.

(The jurors then left the Court room and the following took place in their absence:)

Mr. Baker: There has been a statement made by the witness that he is emotionally or mentally incapable of testifying. So that the record would be crystal clear, I make a request of the Court to appoint a doctor to determine whether or not there is malingering on the part of the witness or anything of the sort.

The Court: In my judgment, this is as near as malingering could ever be determined from my observation.

The Witness: I join in that request, if your Honor please.

The Court: What is the ground of your application?

Mr. Baker: The ground of my application is, if the Court please, the law presumes that when a witness testifies he is to be lucid. This witness says he is not. Any testimony he gives may be prejudicial to the rights and interests of the defendant. That's the ground of my objection, and so that the record would be clear, whether this is malingering or not, there is a mental and emotional condition presently existing in this witness so that he could not be a competent witness to testify, all of which may be to the detriment of the defendant.

The Court: I shall reserve decision on your application and I shall direct the witness to remain in court until I decide it. The Court will take a recess until 1:45.

(After a short recess the Court returned to the courtroom, Mr. Baker and the defendant being present, and the following took place:). The Court: Mr. Baker, I wanted to get both sides here. The reason I have asked Mr. Ungar to remain was because if I had made a decision, why, then, I could have acted on it. Since I haven't made a decision I see no point in having him remain here. He is entitled to take his luncheon recess the same as anybody else, but I didn't want to lose time if I could help it.

Mr. Baker: I am glad the Court indicated the purpose of asking the witness to remain.

The Court: That was the only purpose, because I said to you I reserve decision, and I thought I might be able to decide it and save time. Would it be a burden to give me another five minutes?

Mr. Baker: No, your Honor.

The Witness: Is your Honor addressing me?

The Court: Yes.

The Witness: No, it is not a burden, your Honor, because I was not malingering, and I have been shaking ever since this issue started.

The Court: I just want five more minutes and if I don't decide it by that time, then we will all go to lunch.

(A short recess was taken; the Court left the courtroom and returned.)

The Court: Mr. Ungar, I haven't made up my mind what course of action I should take. I think you ought to take a recess until 1:45. Let us see what the situation is at that time.

The court did nothing to determine appellant's emotional condition at that time or any other time. During the recess the appellant obtained medical assistance and

continued his testimony that day and the subsequent trial date without incident. (929-932, 1328-1334 Record on Appeal, "In the Matter of Criminal Contempt of Sidney J. Ungar, etc.")

The following appears at 930:

"The Court: Now, Mr. Witness, before we took a luncheon recess you personally, as a witness, had asked for a recess. Do you recall that?"

The Witness: I do, your Honor.

The Court: Now that we have had the luncheon recess and you have come back, do you still ask for a recess?

The Witness: Well, I would like to report to the Court that I went to the hospital and received an injection, and I think that I can proceed temporarily, in addition to the pills that I have taken this morning.

The Court: Very well.

Mr. Scotti: May I proceed, your Honor?

The Court: Yes."

At 1332 the following is recorded:

"The Court: I thought it was obvious to everyone that when the witness resumed the stand at 1:45 P.M. after the luncheon recess, and the Court asked the witness whether his request for a recess while testifying on the stand, and before the announcement of the luncheon recess, still stood. The witness said he had been to a hospital to get a shot, and that he could.

Mr. Scotti: That he could proceed temporarily.

The Court: That he could proceed temporarily, and I thought that everyone then understood that the witness himself had concluded the issue by declaring that he was then able to proceed, and consequently made no formal declaration on the record.

To avoid any possible question about that I now deny the motion."

The Contempt Proceedings

At no time while appellant testified did the appellee cite or rule him as contemptuous. Nor did he seek an explanation for the emotional state of appellant on November 25, 1960 when he was requested by both appellant and by counsel for the defendant to do so (1332).

Instead, appellee waited until after the conclusion of the Jack trial on December 6, 1960. Thereupon on Thursday, December 8, 1960 at about 5 P.M. he caused an order to show cause to be served on appellant consisting of 32 pages in the printed record returnable on Tuesday morning, December 13, 1960, citing appellant for the contempt of November 25, 1960. It should be observed that although the appellant was charged with only the single incident of contempt on November 25, nevertheless, that charge is preceded by 13 recitals of other events which but served to perplex the appellant in attempting to defend. Appellant's burden to prepare his defense was thus compounded. The appellant thus had only about four days in which to meet the charges and those four days were interrupted by the intervening Saturday and Sunday during which a 17 inch snowstorm fell, paralyzing traffic on Monday. Appellant retained counsel on Saturday. But this counsel felt that he couldn't adequately prepare a defense unless an adjournment were obtained. On the return day on December 13, 1960, that counsel appeared with appellant and requested the adjournment on the ground of his lack of preparation and also because of his actual engagement at a trial in another court of record. It was denied. The denial was in breach of Rule VII of appellee's court which requires that in the event of an actual engagement by counsel in a trial in a

court of record, the action shall be passed for the day or until the trial is concluded. Whereupon, counsel withdrew, leaving appellant without representation. Appellant requested an adjournment because he could not go on without counsel. The request was denied (375-381, 382-386, 392, 396, 412).

Appellee stated that appellant had three weeks' notice of the contempt. This is not accurate. Nothing was done by appellee from November 25 to December 8 to put appellant on notice of charges. All that appellee did was to admonish appellant to "keep himself available". This, it is submitted, is not notice of contempt charges. Appellant had no notice until December 8 and until then could very well have had the impression that the incident, in the course of time, would subside and pass (407).

Appellant objected, that he had a right to counsel, in view of the character of the proceedings, and that he was being deprived of counsel although he made all reasonable efforts to provide one (404). Appellant had a defense in good faith to this proceeding by showing the provocation, the lack of intent to be offensive and the emotional strain that led to the outburst.

Nevertheless, appellee proceeded, and adjudged petitioner in criminal contempt of court. He committed appellant to jail for ten days and fined him \$250.00.

Stage and Manner of Raising Federal Questions

The repugnancy of Section 750 Judiciary Law to the federal constitution was raised at the contempt proceeding (401); while not explicitly stated is nevertheless fairly comprised therein. It is also implicit throughout the entire proceedings in the original application before the Appellate Division.

The constitutionality of Section 751 Judiciary Law was raised explicitly before the Court of Appeals on a motion for a rehearing, because the construction of the statute was first made at that stage and could not have been anticipated (see p. 7 of Notice of Motion for Reargument, etc., included in transcript of record). Although the Court of Appeals denied the rehearing, it nevertheless certified that there was presented and necessarily passed upon whether the rights of the appellant to due process under the Fourteenth Amendment were violated by "the trial judge's invoking of summary power under §751 of the Judiciary Law seven days after the end of the trial during which the contempt was committed." (See also and compare p. 2, item (d) and p. 3, item (e) of said Notice of Motion.) The challenge of its repugnancy in its application is also implicit throughout the contempt proceedings before appellee and in the original proceedings before the Appellate Division.

The federal questions sought to be reviewed were raised by appellant in the contempt proceeding in the first instance (378-392), at which time counsel retained by appellant sought an adjournment, but withdrew as counsel when the adjournment was refused. Appellant at that hearing objected to the validity of the hearing because of the postponement of contempt proceedings until after the trial (397); that the charges of contempt are not defined by Section 750 Judiciary Law (401); his right to counsel of his own choice and a reasonable opportunity to prepare a defense (404, 409, 410-412); and that the contempt proceeding should be heard by another judge especially because of his marked hostility and bias (426-429). The appellee rejected those contentions and sentenced appellant to 10 days in jail and fined him \$250. In appellant's original application for review, to the Appellate Division, First Department, he raised the same questions (28-44; 147-152).

The Appellate Division rejected the appellant's contentions, and affirmed the determination of the appellee in adjudging appellant in contempt (13-17). Appellant also appealed from the Mandate of Order and Judgment, and in his brief raised the same federal questions. The Appellate Division, however, dismissed that appeal (Record on Appeal, "In the Matter of the Criminal Contempt of Sidney J. Ungar, etc.", 1372).

The appellant appealed to the Court of Appeals of the State of New York from the affirmance by the Appellate Division of the determination by the appellee and also appealed from the order of dismissal of the appeal from the Mandate of Order and Judgment. In both proceedings appellant raised the federal questions in his brief. The Court of Appeals affirmed both orders of the Appellate Division, but in doing so rendered the following admonition:

"However, we point out that where the alleged contempt consists of the making of charges of wrongdoing by the trial judge himself, he should where disposition of the contempt charge can be withheld until after trial and where it is otherwise practicable, order the contempt proceeding to be tried before a different judge."

Thereafter, appellant moved in the Court of Appeals for a reargument in which he raised the constitutional validity under the Fourteenth Amendment of Section 751, Judiciary Law, as construed by the Court for the first time in holding that summary proceedings may be held before the same judge even after the postponement of contempt proceedings until after the trial at which it occurred. The construction placed on the statute could not have been anticipated until after that court's decision. *Brinkerhoff-Faris Trust Co. v. Hill, supra; Herndon v.*

Georgia, 295 U. S. 441; *Saunders v. Shaw*, 244 U. S. 317, 320. The motion also requested alternative relief that the remittitur be amended to include a recital that there were presented and necessarily passed upon the federal questions raised by appellant. The motion for reargument was denied, but the Court did amend its judgment as set forth above.

Nine copies of the motion for a rehearing are submitted to accompany nine copies of the Record filed herewith.

THE QUESTIONS ARE SUBSTANTIAL

The questions raised challenge the validity of the statutes that authorize summary punishment for contempt of court and their application to the appellant. They thus yield grounds for decision by this court of novel and unsettled questions of constitutional law.

As Mr. Justice Black stated in *Green v. United States*, 356 U. S. 165, at 196 (concurring in by the Chief Justice and by Mr. Justice Douglas):

"The power of a judge to inflict punishment for criminal contempt by means of a summary proceeding stands as an anomaly in the law. In my judgment the time has come for a fundamental and searching reconsideration of the validity of this power which has aptly been characterized by a State Supreme Court as, 'perhaps, nearest akin to despotic power of any power existing under our form of government'."

Again at page 198:

"Summary trial of criminal contempt, as now practiced, allows a single functionary of the state, a judge, to lay down the law, to prosecute those who

he believes have violated his command (as interpreted by him), to sit in 'judgment' on his own charges, and then within the broadest kind of bounds to punish as he sees fit. It seems inconsistent with the most rudimentary principles of our system of criminal justice, a system carefully developed and preserved throughout the centuries to prevent oppressive enforcement of oppressive laws, to concentrate this much power in the hands of any officer of the state. No official, regardless of his position or the purity and nobleness of his character, should be granted such autocratic omnipotence."

The New York Court of Appeals impliedly had some misgivings about the procedure of which appellant complains, for while affirming, it said in its memorandum:

"However, we point out that where the alleged contempt consists of the making of charges of wrongdoing by the trial judge himself he should where disposition of the contempt charge can be withheld until after trial and where it is otherwise practicable, order the contempt proceeding to be tried before a different judge."

Section 750 Judiciary Law as Construed and Applied is Unconstitutional in That it is Vague and Uncertain

Section 750 is vague and indefinite. It violates the principle enunciated in *Winters v. New York*, 333 U. S. 507 that, "There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment." The uncertainty in the statute provides a judge with an elastic weapon whereby he can give the words the meaning he chooses.

In *Commonwealth v. Carpenter*, 91 NE (2d) 666 the Supreme Court of Massachusetts declared a statute un-

constitutional because it rendered a person guilty of disorderly conduct who loitered for 7 minutes after he was ordered by a policeman to move on. That court held the statute to lack standards capable of evaluation.

See also, *Thompson v. Louisville*, 362 U. S. 199, where the case turned on the sufficiency of the evidence in a charge of "loitering" and "disorderly conduct."

The New York statute gives the judge *ad hoc* legislative powers to define in his own cause, what is contemptuous or disorderly. This is clearly endowment of autocratic power which can be exercised with terror and tyranny.

Such a vague statute is especially violative of due process when it empowers an offended judge to punish summarily, aptly illustrated by Lewis Carroll in "Through the Looking Glass":

"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is", said Alice, "whether you can make words mean so many different things."

"The question is", said Humpty Dumpty, "which is to be master—that's all".

Nor does the age of a statute, like Section 750, while impressive, save it from constitutional attack. *Winters v. New York*, *supra*.

There are no reported cases in New York dealing with the constitutionality of Section 750. But in early constructions of the statute, the courts warned that the offense of contempt was not clearly defined; therefore caution was necessary. *Rutherford v. Holmes*, 5 Hun 317, affirmed 66 N. Y. 368; *People v. Oyer etc. Court*, 36 Hun 277, affirmed, 101 N. Y. 245; *Sherwin v. People*, 100 N. Y. 351; *People v. Riley*, 25 Hun 587.

**Section 751, Judiciary Law as Construed and
Applied is Unconstitutional as a Denial
of Due Process**

The Court of Appeals in its certificate noted the presentation and passing upon the federal question about "the trial judge's invoking of summary power under §751 of the Judiciary Law seven days after the end of the trial during which the contempt was committed," and the "same trial judge's presiding in the resulting contempt proceeding even though he was the judge 'personally attacked'". It thus construed the statute to enable the institution of summary contempt proceedings without a time limitation after the commission of the offense. It also construed the statute to permit a judge in a summary contempt proceeding to sit in his own cause.

It is submitted that the statute so construed denies the appellant due process of law.

Due process requires that there be a time limit upon punishment for past offenses. *Gompers v. United States*, 233 U. S. 604, 612. This statute provides none.

Again, since Section 751 is the authority for summary contempt punishments, and the Court of Appeals construed it (as its certificate indicates) to permit summary trials before the same judge, the statute therefore is subject to the infirmities argued in the next point, under the heading, "The Trial of the Contempt proceeding by the Same Judge, etc." For the sake of brevity the arguments are not repeated, but are incorporated herein.

The trial of the contempt proceeding by the same judge who charged appellant with contempt was a denial of due process.

(1)

The appellee postponed the contempt proceedings against appellant until after the conclusion of the Jack trial, when he served a notice of hearing with supporting papers on the appellant. The appellee contended in the courts below that the proceeding was nevertheless summary.* And from that he concluded that in such proceeding due process is not required—the judge, sitting in his own cause, may convict a contemnor without affording him an opportunity to explain or defend himself, deprive him of counsel and of an opportunity to call witnesses on his behalf.

The procedure pursued by the appellee of postponing contempt proceedings until after the trial and proceeding on papers has complicated the issues: The procedure is not that of *Sacher v. United States*, 343 U. S. 1, where the alleged contempts were in open court and contempt proceedings were postponed until after the end of the trial, at which time the judge then and there, without commencing a proceeding on papers, convicted the accused. Nor is this case one where the alleged contempt occurred outside the presence of the trial judge.

Appellant argues here, however, that irrespective of whether the proceedings are labelled summary or non-summary, he was denied due process at a trial of contempt

* The dismissal of the appeal by the Appellate Division and its rendition of judgment on the merits in the Article 78 proceeding, the remedy provided for review of summary contempt proceedings would leave the inference that the Appellate Division treated this case as a summary one. The affirmance by the Court of Appeals of the dismissal leaves the same implication.

proceedings under a statute, as construed by the courts, authorizing summary proceedings to be held by the same judge who accused the appellant of contempt and was personally the subject of attack by appellant.

(2)

The indisputable fact is that the judge who tried the contempt proceeding was the same person who accused the appellant of contempt of court. And it is also an undisputed fact that the proceeding was commenced on December 8, 1960 returnable December 13, 1960, for an alleged contempt of court committed on November 25, 1960 and after the trial at which the contempt was committed had been concluded.

The charge of contempt was that on November 25, 1960, the appellant while testifying as a witness in a criminal case before appellee, said in open court,

"I am absolutely unfit to testify because of your Honor's attitude and conduct towards me. I am being coerced and intimidated and badgered. The Court is suppressing the evidence." (261-262, 168)

A serious question is thus presented: Was the appellant denied due process when the judge who charged the contempt undertook to try and adjudge the appellant?

In the administration of justice, it has been axiomatic that a judge should not sit in judgment in a cause in which he has an interest, especially that of accuser. In *re Murchison*, 349 U. S. 133, this court reviewed a prosecution for contempt that arose under state practice which permitted a judge to sit in judgment in a cause in which he was the accuser. *Murchison* posed the question of due process, for there a one-man grand jury consisting of a single judge, charged witnesses who appeared

before him with contempt. Thereupon, the same judge tried and adjudged them in contempt. This violation of the elementary integrity of justice was intolerable to the sense of fairness of this court, which condemned the action as a violation of due process. This court there said (136):

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' *Tamey v. Ohio*, 273 U. S. 510, 532. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt v. United States*, 348 U. S. 11, 14."

Page 138:

"As a practical matter it is difficult if not impossible for a judge to free himself from the influence of what took place in his 'grand-jury' secret session. His recollection of that is likely to weigh far more heavily with him than any testimony given in the open hearings. . . ."

“ * * * Moreover, as shown by the judge's statement here a 'judge-grand jury' might himself many times be a very material witness in a later trial for contempt. If the charge should be heard before that judge, the result would be either that the defendant must be deprived of examining or cross-examining him or else there would be the spectacle of the trial judge presenting testimony upon which he must finally pass in determining the guilt or innocence of the defendant.”

See also *Re Oliver*, 333 U. S. 257; *Tumey v. Ohio*, 273 U. S. 510; Frankfurter & Landis, “Power to Regulate Contempt,” 37 Harvard Law Review, 1010.

Likewise, this court in *Offutt v. United States*, 348, U. S. 11, a summary proceeding, overruling *Sacher v. United States*, *supra* by implication, had occasion to point up the offensiveness of the judge who undertakes to punish for a contempt in his own cause. *Offutt* was decided later than *Sacher*. Yet it held that where there was personal involvement by the judge with the accused, the contempt proceedings should be held before another judge. See also *Cooke v. United States*, 267 U. S. 517; *Brown v. United States*, 359 U. S. 41, 61; 48 A.B.A.J. 1024.

Since the appellant stood in an adversary relationship with appellee by reason of appellant's attack on him, it is all the more reason that *Offutt* should apply here.

(4)

Whatever be the state of the law now on the subject of summary and non-summary contempt proceedings three justices of this court (the Chief Justice, Justice Black and Justice Douglas) called upon the court in *Green v. United States*, 356 U. S. 165, 193 to reconsider this most fundamental aspect of due process, inherent in even sum-

mary proceedings, that there shall be an impartial judge in a cause, *whether the offense was committed in the presence of the court or not.*

Justice Black, after stating the words quoted at pp. 19-20, *supra*, took great pains to condemn all summary trials of criminal contempt in these words:

Indeed if any other officer were presumptuous enough to claim such power I cannot believe the courts would tolerate it for an instant under the Constitution. Judges are not essentially different from other government officials. Fortunately they remain human even after assuming their judicial duties. Like all the rest of mankind they may be affected from time to time by pride and passion, by pettiness and bruised feelings, by improper understanding or by excessive zeal. Frank recognition of these common human characteristics, as well as others which need not be mentioned, undoubtedly led to the determination of those who formed our Constitution to fragment power, especially the power to define and enforce the criminal law, among different departments and institutions of government in the hope that each would tend to operate as a check on the activities of the others and a shield against their excesses thereby securing the people's liberty.

When the responsibilities of lawmaker, prosecutor, judge, jury and disciplinarian are thrust upon a judge he is obviously incapable of holding the scales of justice perfectly fair and true and reflecting impartially on the guilt or innocence of the accused. He truly becomes the judge of his own cause. The defendant charged with criminal contempt is thus denied what I had always thought to be an indispensable element of due process of law—an objective, scrupulously impartial tribunal to determine whether he is guilty or innocent of the charges filed against him. In the words of this Court: "A fair

trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome . . . Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer." In re Murchison, 349 U. S. 133, 136-137. Cf. *Chambers v. Florida* 309 U. S. 227, 236-237; *Tumey v. Ohio*, 273 U. S. 510; In re *Oliver*, 333 U. S. 257.

(5)

Moreover, whatever justification may be discerned in permitting a judge to summarily punish at the time of the offense loses validity with respect to proceedings to punish for the offense, as here, 18 days after the offense and conclusion of the trial at which it took place. It might be argued that a judge himself should be empowered to summarily try and punish for an offense committed in his presence as a means towards keeping order at the trial and efficiently dispatching it (although contrary argument could be made that there are other means of attaining such results without the necessity of empowering a judge with such autocratic powers).

But the end sought by the grant and exercise of such powers becomes non-existent after the trial is concluded. The emergency gone, contempt proceedings after the trial should therefore be respected with the due process, guaranteed as in plenary adjudications.

Furthermore, the opportunity for the appellant to prove his emotional state was also impaired, since the judge did nothing at the time of the incident to verify his own accusation that the appellant was malingering, although

he took two recesses for that purpose (242-246). Attempting to prove it 18 days later might be a futility (240).

See also, *Totolo Newspaper Co. v. United States*, 247 U. S. 402, 425.

(6)

Even the Court of Appeals in this case recognized in its decision the unfairness of the procedure.

Since the contempt charge had been withheld in this case until after the trial of the action in which the contempt occurred, the Court of Appeals should have made its pronouncement effectual by reversing the proceedings. Unfortunately, its statement was of no aid to the appellant. It is merely an admonition for use in subsequent cases by those who might ferret it out. Appellant was thus denied due process of law. He was not given the benefit of the construction of the statute, but, instead was the guinea pig for the benefit of others. *Lanzetta v. New Jersey*, 306 U. S. 451.

(7)

Appellant did make a personal attack on appellee by accusing appellee of badgering him and suppressing the evidence. They were consequently cast in adversary roles. This is contrary to the finding of the Court of Appeals; but this court may review such finding because it affects the constitutional right claimed to have been denied. *Chambers v. Florida*, 309 U. S. 227, 228; *Niemotko v. Maryland*, 340 U. S. 268, 271.

Fulfillment of due process should not be dependent upon distinctions whether the contempt was an attack upon the judge personally or whether it was an offense against the dignity of the court and good order. Justice Jackson in *Sacher* well pointed out that there really is no separation, because the court is the judge and the offense is directed at him as a human being; as an indivisible body.

(8)

In any event, in this case, the appellee felt himself personally offended when the appellant made the statement for which he was charged with contempt. The petitioner had stated, "I am absolutely unfit to testify because of your Honor's attitude and conduct towards me." Thereupon, the appellee replied, "You are not only contemptuous but disorderly and insolent" (235).

(9)

Indeed, it was most essential that the contempt proceeding be held before an impartial judge, because the judge was hostile toward appellant from the very inception of his several days on the witness stand; furthermore, there was a genuine issue whether the alleged contemptuous words were compelled by the emotional distress of three days of testifying in a hostile atmosphere (28, 328), and moreover, the judge as an adversary would have been subject to examination as a witness and as such, could adjudicate objections raised during his testimony (*Re Murchison*, 349 U. S. 133, 138).

The Appellant Was Not Accorded Due Process of Law in the Contempt Proceeding

This Court, in *re Oliver* 333 U. S. 257 and recently reaffirmed in another state case, in *re Green*, 369 U. S. 689 (1962), held that, in contempt proceedings due process is satisfied if the following conditions are met: 1) the accused must be advised of the charges; 2) he must have a reasonable opportunity to meet the charges by way of (a) defense or (b) explanation; 3) he must have the right to be represented counsel; and 4) he must be afforded an opportunity to call witnesses.

These conditions do not exact more than fairness requires, since it must be recognized that a contempt proceeding is a criminal prosecution. Holmes, J., in *Gompers v. United States*, 233 U. S. 604, 610-611.

None of those conditions were met in this case, except that the appellant received notice of the proceeding and the lengthy charges four days before the return date.

The appellant was denied a reasonable opportunity to meet the charges by way of defense or explanation and was in effect, denied counsel because counsel could not represent the appellant upon the refusal of a short adjournment by the court to enable him to prepare.

The contempt proceeding was begun by the service of an order to show and supporting papers, which in the printed record occupy 32 pages (pages 87-119) of 14 complex and confusing specifications in late afternoon of Thursday, December 8, 1960, returnable on Tuesday, December 13, 1963. During the weekend of December 10 and 11, a 17 inch snowstorm paralyzed traffic and work in New York (147). Appellee, with the copious assistance of the district attorney's staff had devoted six days to preparing the moving papers.

Nevertheless, when appellant appeared at the hearing on December 13, he was denied a short adjournment in order to enable appellant's chosen counsel, who had another court engagement that day, to prepare for the hearing (377-392). Counsel had to withdraw his appearance since he could not obtain the adjournment for the purpose of enabling him to prepare an adequate defense. Thereupon, the appellee immediately proceeded to try appellant without counsel and without reasonable opportunity to prepare his defense or give explanation (393-423). Appellant pleaded with the court to afford him an opportunity to prepare a defense against the contempt

charge. He stated that he had not committed a contempt or ever intended to do so. Appellant required time too, to support his defense with proof of medical testimony that the words allegedly contemptuous were the product of an emotional strain and that he had received medication during the recess on November 25, to alleviate the strain. But the court disregarded these pleas, and adjudged him in contempt (413, 422, 423, 430).

Considering the volume of the paper work alone involved in the contempt proceedings, the researches required of the exhibits of testimony of the trial at which appellant testified, the complex and difficult questions of statutory and constitutional law involved, and the medical testimony to be collected, it is obvious that counsel could not adequately prepare himself in the two days available. Yet here counsel retained on Saturday for the hearing on Tuesday also had another court engagement. The appellant's request for an adjournment was under the circumstances reasonable. It could not have mattered for the prompt vindication of the court whether an adjournment for 8 days or 18 days was granted. No one would have been prejudiced. Yet, appellee refused to grant one for an hour (430).

It cannot be said that the appellant had 18 days notice, because he had been cautioned at the trial that he was contemptuous, or that he should "hold himself available" (388)—whatever such words signify. His notice began when he was served on December 8 with a notice of a proceeding. Until that time he had no charges against him against which to prepare. For all he knew, the episode might have blown over.

Therefore, when the adjournment was denied and counsel withdrew from the case, the appellant was denied the opportunity to be represented by counsel; he was denied

an opportunity to adequately defend or explain himself and was denied the opportunity to call witnesses in his behalf.

Even state practice should have accorded him the adjournment. Evidently, the hostile atmosphere in which the proceeding was conducted deprived him of those constitutional protections. The refusal of an adjournment was a violation even of the Rules of appellee's own court. Rule VII of the Rules of the Court of General Sessions of the County of New York states:

"No adjournment of trial shall be granted by reason of engagement of counsel * * * unless it be made to appear by affidavit that counsel * * * is actually engaged in the trial of a case in a court of record of the State of New York, in which event the trial of the action shall be passed for the day or until such argument or trial is concluded * * *"

See also, *Matter of Rotwein*, 291 N. Y. 116; *People v. McLaughlin*, 291 N. Y. 483; *People v. Koch*, 299 N. Y. 378, 381; *People v. Gordon*, 262 A.D. 534, 536.

The Conduct of the Appellant Was Not Contemptuous Under the Circumstances of Provocation and Emotional Distress; and a Construction of the Vague Statute to render Appellant Guilty is a Denial of Due Process

Section 750 Judiciary Law, under which appellant was prosecuted, empowers a court to punish for a criminal contempt when the conduct is disorderly, contemptuous or insolent, directly tending to interrupt the court's proceedings and impair its respect. Under this vague statute this appellant was adjudged guilty on the single charge

that on November 25, 1960 after 3 days of testimony and after he had repeatedly pleaded with the court in vain for a recess, he made the accusation against the judge.

His words cannot be assessed in a vacuum if determination is sought whether they are of the character the statute condemns.

It is necessary to read the record of the events prior to those words and subsequent thereto. It must be borne in mind that the appellant, a lawyer, had been named in the indictment of Hulan Jack of conspiring with Jack to obstruct justice and for having given Jack gifts or loans in violation of law. Although the appellant was not a defendant, he as a lawyer and as a citizen was actually exposed as a coconspirator to the attendant publicity of pretrial and long trial and retrial procedures. As a witness called by the People he was subject to the inquisition which put his character and reputation to public view. It is understandable that a person in such position would be under a strain and would be cautious in his answers, even to the point of insisting as a party to the transaction on bringing out the "whole story", where he felt there was nobody at the trial who was interested in doing so. Even if such conduct be deemed offensive, it is, nevertheless, understandable. Yet, the appellee and the district attorney, whose witness appellant was, took a hostile attitude toward him, from the very beginning of his testimony, intimating that appellant had been responsible for the retrial that had been necessitated through disagreement of the jury at the first trial where petitioner had testified for 6 days. An example is the following, appears at 329:

"The court: Now, Mr. Witness, this case was tried once before and took considerable time. You were a witness for many days. A number of incidents occurred in that trial which, in my judgment, directly tended to interrupt the proceedings of the

Court and to impair the respect due to the authority of the Court, and you were the one who created those incidents, in my judgment."

With the emotional strain building up from questions which the witness in good faith felt he could not answer fully and honestly, it is not surprising that on the third day of testimony, the following respectful plea ensued, (227):

"The Witness: If your Honor please, I want to recess at this point. I can't testify. I am too upset, and I am much too nervous. And I can't testify under these circumstances. I am not being a voluntary witness. I am being pressured and coerced and intimidated into testifying, and I can't testify under these circumstances."

Then followed, (232):

"The Witness: I can't testify, your Honor. I am shaking all over, And I must have a recess, I just am absolutely a bundle of nerves at this point, and I don't know what I'm doing or saying any more.

I ask for the privilege of leaving the stand, your Honor.

The Court: No, you will remain on the stand.

The Witness: I can't testify, I'm sorry, your Honor. I am not in any physical or mental condition to testify.

The Court: Mr. Witness, no one asked you anything. Nobody is questioning you. You are not testifying. We have taken a recess for about three minutes of silence, and we will take a few more minutes.

The Witness: I would like to leave the stand, your Honor.

The Court: No, you may not leave the stand."

The court disregarded the request and proceeded,
(234):

"The Court: Proceed, Mr. Scotti.

The Witness: I am not going to answer questions, your Honor. I am not going to testify in this confusion, and the Court nor anyone else will make me testify in this emotional state. I am absolutely unfit to testify because of your Honor's attitude and conduct towards me. I am being coerced and intimidated and badgered. The Court is suppressing the evidence.

The Court: You are not only contemptuous but disorderly and insolent.

The Witness: I have asked for the privilege of leaving the stand for five minutes.

The Court: Put your question, Mr. Scotti.

Mr. Baker: May I renew my motion?

The Court: The motion is denied.

Mr. Baker: Exception.

Q. Mr. Ungar, did you tell Mr. Jack that Saturday morning that there was a conflict between your story to me and Mr. Bechtel's story to me? A. I can't answer any questions. I am not even concentrating on what you are saying. I can't even think clearly at this minute any more.

The Court: Do you refuse to answer?

The Witness: I don't know what he is talking about, Judge. I am an emotional wreck at this time. I am asking for a recess. I ask the right to get off this stand so that I can contain myself.

The Court: Do you refuse to answer the question, Mr. Ungar?

The Witness: I said I can't answer the question, your Honor.

The Court: Put the question, Mr. Reporter:

Mr. Scotti: Mr. Reporter, read the question.

(The question was read by the Court Stenographer as follows:

'Q. Mr. Ungar, did you tell Mr. Jack that Saturday morning that there was a conflict between your story to me and Mr. Bechtel's story to me?')

The Court: Let the record show that the defendant has remained silent and has not answered the question for four minutes.

Mr. Scotti: You mean the witness, your Honor.

The Court: What did I say?

Mr. Scotti: The defendant.

The Court: Obviously I meant the witness. Very well, we will advance our luncheon recess."

The circumstances under which the words were uttered show that they were not wilful, but made in good faith in the belief they were true and while under a severe emotional strain. This is verified by the fact that during the recess appellant obtained medical assistance at a hospital, testified that day and at the subsequent trial date without incident (143). The appellee had accused the appellant of malingering without proof or verification (240-246), but did nothing then or at any time about establishing that fact.

From the foregoing, the only conclusion permissible is that the appellant in good faith sought to testify fully, but through the badgering of the district attorney and the provocations of the appellee, the incident occurred with which the appellant was charged. A finding that the appellant violated the vague statute cannot comport with due process. *Thompson v. Louisville, supra.*

It is ironical that when another witness, Robert Moses, testified, the appellee hardly reacted to that witness' attitude—an attitude that makes appellant's conduct pale by comparison (520, 521, 528-555).

Conclusion

Because of the hybrid remedy chosen by appellee, it is necessary that the threads of the argument be gathered together in these closing words, submitting that substantial questions are presented.

If the remedy pursued by the appellee be deemed simply a summary one, in that appellee had a right to punish appellant without a hearing immediately at the outburst, then such procedure was qualified so that appellant should then have been afforded an opportunity to explain his emotional outburst which as the record reveals, could have been explained by the background of the case, the emotional strain under which appellant was suffering and the medical attention required. After postponement of such proof beyond the time of the incident, appellee should have afforded appellant a genuine hearing to make the explanation of his good faith and his emotional strain. Out of the respect for the principles enunciated in the *Offutt* case, such proceeding should have been held before another judge.

In any event, the call for reconsideration of the procedures in summary contempt sounded by Justice Black should be heard now. This case makes such call appealing.

If this proceeding be deemed non-summary, then of course, all the requirements of due process in a plenary suit should have applied. The appellant was entitled to counsel, to meet the charges and to produce witnesses. In summary, he was entitled to due process, but it was denied to him.

Respectfully submitted,

May 23, 1963.

EMANUEL REDFIELD,
Counsel for Appellant.

APPENDIX A
STATE OF NEW YORK
IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Fourth day of April A. D. 1963.

Present—Hon. CHARLES S. DESMOND, Chief Judge,
presiding.

Mo. No. 287

In the Matter of the Application of SIDNEY J. UNGAR,
Appellant,
vs.

Honorable JOSEPH A. SARAFITE, Judge of the Court of
General Sessions of the County of New York,
Respondent,
to review a determination &c.

A motion to amend the remittitur in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted. The return of the remittitur is requested and,

Appendix A

when returned, it will be amended by adding thereto the following:

Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz: Whether the rights of the appellant to due process under the Fourteenth Amendment to the Constitution of the United States were violated. The appellant argued that such rights were violated by (1) the trial judge's refusal to grant an adjournment of the contempt proceeding upon proof of the engagement of his counsel; (2) the trial judge's invoking of summary power under §751 of the Judiciary Law seven days after the end of the trial during which the contempt was committed, and (3) the same trial judge's presiding in the resulting contempt proceeding even though he was the judge "personally attacked". The Court of Appeals held that appellant's contemptuous remarks were not a personal attack upon the trial judge, and that in no way was there a denial of any constitutional rights of appellant.

AND the Supreme Court of New York County is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

GEORGE KIMBALL

Clerk

APPENDIX AA
STATE OF NEW YORK
IN COURT OF APPEALS

At a Court of Appeals for the State of New
York held at Court of Appeals Hall in
the City of Albany on the Fourth day of
April A. D. 1963.

Present—Hon. CHARLES S. DESMOND, Chief Judge,
presiding.

Mo. No. 287

In the Matter
of
the Criminal Contempt of
SIDNEY J. UNGAR,

Appellant,

v.

HONORABLE JOSEPH A. SARAFITE,
Judge of the Court of General Sessions,
Respondent.

A motion to amend the remittitur in the above cause
having been heretofore made upon the part of the appel-
lant herein and papers having been submitted thereon and
due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby
is granted. The return of the remittitur is requested and,

Appendix AA

when returned, it will be amended by adding thereto the following:

Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz: Whether the rights of the appellant to due process under the Fourteenth Amendment to the Constitution of the United States were violated. The appellant argued that such rights were violated by (1) the trial judge's refusal to grant an adjournment of the contempt proceeding upon proof of the engagement of his counsel; (2) the trial judge's invoking of summary power under §751 of the Judiciary Law seven days after the end of the trial during which the contempt was committed, and (3) the same trial judge's presiding in the resulting contempt proceeding even though he was the judge "personally attacked".

The Court of Appeals held that appellant's contemptuous remarks were not a personal attack upon the trial judge, and that in no way was there a denial of any constitutional rights of appellant.

AND the Appellate Division, First Judicial Department, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

GEARON KIMBALL
Clerk

APPENDIX B

No. 367

COURT OF APPEALS**State of New York, ss.:**

Pleas in the court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 28th day of February, in the year of our Lord one thousand nine hundred and sixty-three, before the Judges of said Court.

Witness,

The Hon. CHARLES S. DESMOND, Chief Judge, Presiding,
RAYMOND J. CANNON, Clerk.

Remittitur February 28, 1963.**[SAME TITLE]**

BE IT REMEMBERED, That on the 25th day of September in the year of our Lord one thousand nine hundred and sixty-two, Sidney J. Ungar, the appellant—in this cause, came here unto the Court of Appeals, by William G. Mulligan, his attorney and filed in the said court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Honorable Joseph A. Sarafite, Judge of the Court of General Sessions, the respondent—in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney.

Appendix B

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Miss Eve M. Preminger of counsel for the appellant—, and by Mr. H. Richard Uviller of counsel for the respondent, brief filed by amicus curiae and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed without costs. However, we point out that where the alleged contempt consists of the making of charges of wrongdoing by the trial judge himself he should, where disposition of the contempt charge can be withheld until after the trial and where it is otherwise practicable, order the contempt proceeding to be tried before a different judge.

And it was also further ordered, that the record aforesaid, and the proceeding in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, without costs, &c., as aforesaid.

AND hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided,

Appendix B

to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

/s/ **RAYMOND J. CANNON**
Clerk of the Court of Appeals
of the State of New York

Court of Appeals, Clerk's Office,
Albany, February 28, 1963.

I hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

/s/ **RAYMOND J. CANNON,**
Clerk.

SEAL

APPENDIX BB
COURT OF APPEALS

State of New York, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 28th day of February, in the year of our Lord one thousand nine hundred and sixty-three, before the Judges of said Court.

Witness,

The Hon. CHARLES S. DESMOND, Chief Judge, Presiding,
RAYMOND J. CANNON, Clerk.

Remittitur February 28, 1963

In the Matter of the

Application of SIDNEY J. UNGAR,

Appellant,

v.

Honorable JOSEPH A. SARAFITE, Judge of the Court of General Sessions of the County of New York;

Respondent:

to review a determination, etc.

BE IT REMEMBERED, That on the 25th day of September in the year of our Lord one thousand nine hundred and sixty-two, SIDNEY J. UNGAR, the appellant in this cause, came here unto the Court of Appeals, by WILLIAM G. MULLIGAN, his attorney, and filed in the said Court a Notice

Appendix BB

of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Honorable Joseph A. Sarafite, Judge of the Court of General Sessions, the respondent—in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, is hereto annexed.

WHEREUPON, the said Court of Appeals, this cause having heard this case argued by Miss Eve M. Preminger, counsel for the appellant—and by Mr. H. Richard Uviller of counsel for the respondent, brief filed by amicus curiae and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby are affirmed without costs. (See *Matter of Ungar*, decided herewith).

And it is also further ordered, that the record aforesaid, and the proceeding in this Court, be remitted to the Appellate Division of the Supreme Court, First Judicial Department, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed without costs, etc., as aforesaid.

AND hereupon, as well the Notice of Appeal and return thereto aforesaid as the order of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, First Judicial Department, before the Justices thereof, according to the form of the statute

Appendix BB

in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York.

Court of Appeals, Clerk's Office,
Albany, February 28, 1963.

I hereby certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON,
Clerk.

LIBRARY
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Office-Supreme Court, U.S.

FILED

JUN 27 1963

JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States
October Term, 1963

No. 167

SIDNEY J. UNGAR,

against

Appellant,

Honorable JOSEPH A. SARAFITE, Judge of the Court
of General Sessions of the County of New York,
Appellee.

MOTION TO DISMISS

FRANK S. HOGAN,
District Attorney
New York County

H. RICHARD UVILLER
MALVINA HALBERSTAM
Assistant District Attorneys
Of Counsel

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IN THE
Supreme Court of the United States
October Term, 1962

No. _____

SIDNEY J. UNGAR,

Appellant,

against

Honorable JOSEPH A. SARAFITE, Judge of the Court of
General Sessions of the County of New York,

Appellee.

MOTION TO DISMISS

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, appellee moves to dismiss the appeal in the above-entitled action on the ground that it is not within the jurisdiction of this Court because not taken in conformity to 28 U. S. C. §1257(2) and on the ground that it does not present a substantial federal question.

Jurisdiction

The appellant seeks to invoke this Court's jurisdiction under 28 U. S. C. §1257(2) by contending that Sections 750 and 751 of the Judiciary Law of the State of New York are unconstitutional as applied to the appellant. However, throughout the proceedings below the appellant contended only that the procedure adopted by the trial court violated his constitutional rights. See, Appellant's brief to the New York Court of Appeals, pp. 5-20; Appellant's brief to the New York Supreme Court, Appellate Division—First Department, In the Matter of The Criminal Contempt of Sidney J. Ungar, pp. 18-40. Neither in the contempt proceeding, nor in his three briefs to the Appellate Division, nor in his brief to the Court of Appeals did the appellant ever contend that either Section 750 or Section 751 of the Judiciary Law of the State of New York on its face, as construed, or as applied, is invalid under the United States Constitution. That the validity of the statutes was not raised in the state courts is also evident from the order of the New York Court of Appeals directing that the remittitur be amended, which states:

Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz: Whether the rights of the appellant to due process under the Fourteenth Amendment to the Constitution of the United States were violated. The appellant argued that such rights were violated by (1) the trial judge's refusal to grant an adjournment of the contempt proceeding upon proof of the engagement of his counsel; (2) the trial judge's invoking of summary power under §751 of the Judi-

ciary Law seven days after the end of the trial during which the contempt was committed, and (3) the same trial judge's presiding in the resulting contempt proceeding even though he was the judge "personally attacked".

The Court of Appeals held that appellant's contemptuous remarks were not a personal attack upon the trial judge, and that in no way was there a denial of any constitutional rights of appellant.

The following decisions hold that where the validity of the statute is not "drawn in question" by an explicit and timely insistence in the state courts that the statute, as applied, is repugnant to the United States Constitution, this Court has no jurisdiction under 28 U. S. C. §1257(2) and the appeal must be dismissed. *Slagle v. Ohio*, 366 U. S. 259 (1961); *Rohr Aircraft Corp. v. San Diego County*, 362 U. S. 628 (1960); *Anonymous v. Baker*, 360 U. S. 287 (1959); *Hanson v. Dinckla*, 357 U. S. 235 (1958); *Wilson v. Cook*, 327 U. S. 474 (1946); *Charleston Federal Savings & Loan Assn. v. Alderson*, 324 U. S. 182 (1945); *Memphis National Gas Co. v. Beeler*, 315 U. S. 649 (1942).

Statement

The appellant, an attorney, was adjudged guilty of criminal contempt by the respondent and sentenced to pay a fine and serve a 10 day jail term. The judgment was affirmed by the Appellate Division of the Supreme Court of the State of New York and by the New York Court of Appeals. The contempt was committed by the appellant when he shouted in a loud, angry, and insolent tone, in the presence and hearing of the court and jury,

"I am being coerced and intimidated and badgered. The Court is suppressing the evidence,"

while appearing as a witness in the trial of Hulan E. Jack (27-30, 127-9).^{*} In his brief to the New York Court of Appeals, the appellant concedes that this constitutes a *prima facie* contempt (Appellant's brief to the New York Court of Appeals, p. 2).

In the early part of 1960, Hulan E. Jack, then Borough President of Manhattan, was charged in a four-count indictment with the crimes of conspiracy and violations of the New York City Charter. In substance, the indictments read as follows: The first count accused Jack of conspiring with the appellant and others to obstruct justice by concealing the appellant's payments to a contractor for renovation of Jack's residence; the second and third counts pertained to Jack's violating the New York City Charter by accepting gifts or loans from a person—the appellant—interested in matters involving payments from the New York City Treasury; the fourth count charged Jack with a similar violation, accepting gratuities from a person—the appellant—whose business activities were subject to Jack's official actions. Two trials ensued. Both were presided over by the respondent and the second resulted in a conviction of Hulan E. Jack.

The appellant, who had received immunity, was called as a witness by the People at both trials. A long-time friend of the defendant and hostile to the People, the appellant was uncooperative, unresponsive, and disrespectful,

^{*} References, unless otherwise indicated, are to folios in the Record on Appeal filed in the Court of Appeals.

refusing to answer proper questions, volunteering irrelevant matter, asserting that he had no knowledge or recollection of pertinent matters which were clearly known to him, and cavilling about the form of certain questions. Numerous instances of such conduct are set forth in the order to show cause (31-129). When the appellant persisted in this manner despite repeated warnings by the court, the judge recessed the trial, retired to the Judge's Robing Room, and out of the hearing of the jury, stated:

The Court: Now, Mr. Witness, this case was tried once before and took considerable time. You were a witness for many days. A number of incidents occurred in that trial which, in my judgment, directly tended to interrupt the proceedings of the Court and to impair the respect due to the authority of the Court, and you were the one who created those incidents, in my judgment.

I told you then, at the first trial, that you were creating a very serious problem for the Court and that as a lawyer, I assumed you knew what the problem was.

I should like very much to avoid any repetition of what happened last time.

We each have a function to perform here. Whether it is an agreeable function or a disagreeable function is of no concern.

Now I have said to you up to now on a number of occasions that you should confine your answers to the questions, not to volunteer, not to get into any dispute or discussions, not to try to indicate what you think the question should be or how you should answer it.

This is a trial before a jury, not before a Court, alone. As a judge, I must rule in accordance with my understanding of the law, which I am doing.

The Witness: I have got to understand the question, in order to answer it. I can't answer a question merely if Your Honor says, "Answer it," if it doesn't make sense to me or if it is creating a false impression—

The Court: Will you desist. You see, it's none of your business whether it creates in your judgment a false impression or not. The defendant is represented here by a lawyer, and the People are represented by a lawyer. It is for them to conduct this litigation, and not you.

Now I am only going to make one more statement and we will return to the courtroom.

There is a rule of law that every man is presumed to intend the natural consequences of his act. I am going to hold you to that standard.

[A]s a lawyer you certainly know the rules of law of evidence (100-107).

Nevertheless, the appellant maintained his original course of conduct, which culminated in his shouting at the court in the presence of the jury the statement above quoted, for which he was held in contempt.

The Contempt Proceeding

The court immediately informed the appellant that he was "not only contemptuous but disorderly and insolent" (917). When the appellant completed testifying he was directed by the court to keep himself available for future action concerning his contemptuous conduct:

The Court: Now Mr. Witness, with regard to your conduct as a witness in this case, the Court is deferring action until the completion of this trial. Please hold yourself available at that time (1326).

At the subsequent hearing, the court stated that the reason he had not held petitioner in contempt immediately was that he did not want to take any action during the trial which might tend to diminish in the slightest the rights of the defendant to a fair trial (136-8, 154).

Having deferred action until the end of the trial, the court gave the appellant five days' written notice of the charges against him, including a list of numerous other incidents evidencing the persistence and deliberateness of his conduct, and an opportunity to present a defense (136-8, 154-6). At the inception of the hearing, an adjournment was requested on the ground that counsel whom appellant had retained was engaged in another matter (133-4). The court granted a recess of several hours to permit counsel himself to argue for an adjournment (131, 140-3). When counsel appeared he informed the court that at the time of his retainer by the appellant he was already engaged in the other matter and that he had told the appellant that he could not represent him unless he obtained an adjournment (144-52). The court declined to grant an adjournment, stating that the appellant, knowing his conduct had been considered contemptuous and having been informed of the imminency of the contempt proceeding, should not have retained an attorney who could not represent him (152-8). After introducing certain evidence himself (Ct. Exh. 1, at 158-60, reproduced at 205-30; Ct. Exh. 2, at 161; Ct. Exh. 3, at 161-2; reproduced at 232-1334), the court gave the appellant an opportunity to show cause why he should not be held in contempt (162-3). Declaring that he did not wish anything he said to be taken as participation by him in the hearing on the merits (163), the appellant made a statement addressed to the court's authority to hold him in contempt in a summary proceeding and to its denial of

an adjournment (163-80). It was only after he had been adjudged in contempt that he belatedly requested an adjournment to produce evidence (200), which he easily could have had ready for the hearing.

No Substantial Federal Questions are Presented

(1) The appellant's conduct constituted contempt of court

In his brief to the New York Court of Appeals, the appellant conceded that his conduct, if deliberate, constituted a *prima facie* contempt (Appellant's brief to the New York Court of Appeals, p. 2). Appellant's contemptuous intent is manifest in thirteen incidents in his testimony during the two days of the trial which preceded the single utterance for which he was cited. These incidents were set forth in excerpts recited in the order to show cause and referred to in the mandate of commitment. The thirteen extracted portions of the appellant's testimony contain: unresponsive answers to proper questions (47, 74, 76, 85, 98, 119-21); unsolicited interjections of irrelevant comments and explanations (50-1, 57, 66, 69); assertions of inability to recall matters apparently within the appellant's knowledge (59, 78-9, 114-6, 120); interruptions to cavil about the form of the questions (44-5, 61-2, 113-4); and refusals to answer yes or no to questions susceptible to an unqualified answer (67-8, 96). These incidents, considered in light of the fact that the appellant had engaged in similar conduct at a previous trial and had been specifically warned not to do so again, provide ample evidence of deliberate contempt. Moreover, the record can never convey "the complete picture of the courtroom scene. It does not depict such elements of misbehavior as expression, manner

of speaking, bearing, and attitude . . . *Fisher v. Pace*, 336 U. S. 155, 161 (1949). Therefore, particular reliance must be placed on the fairness and objectivity of the presiding judge.

In view of his concession in the New York Court of Appeals that his conduct constituted a *prima facie* contempt, the appellant's contention here that Section 750 of the New York Judiciary Law is vague as construed and as applied, is hardly tenable.

(2) A summary adjudication of contempt was proper

New York law provides that, "contempt, committed in the immediate view and presence of the court, may be punished summarily" (Judiciary Law of New York, Section 751). The necessity for the exercise of such summary power has long been recognized in the law, and its use was very early sanctioned by this Court. *Ex Parte Terry*, 128 U. S. 289 (1888). The contention that it is violative of due process was specifically rejected in *Fisher v. Pace*, *supra*, 336 U. S. 155, 159-60, the Court stating,

This attribute of courts is essential to preserve their authority and to prevent the administration of justice from falling into disrepute. Such summary conviction and punishment accords due process of law.

It is not disputed, and indeed could not be, that the conduct for which the appellant has been cited for contempt occurred in the immediate view and presence not only of the court, but of the jury, the public, and the press present in the courtroom. Consequently there can be no doubt that the court had the lawful power to punish the appellant summarily for criminal contempt.

(3) The question presented by the appellant's contention was decided by this Court in *Sacher v. United States*

Although articulated in several different ways, essentially the appellant's contention is that a summary adjudication of contempt after the termination of the trial in which the contempt occurred is violative of due process. Substantially the same question was decided by this Court in *Sacher v. United States*, 343 U. S. 1 (1952). Sustaining the trial court's power to defer punishment till the end of a nine month trial, this Court wrote:

We think "summary" as used in [Rule 42(a), Fed. R. Crim. Proc.] does not refer to the timing of the action with reference to the offense but refers to a procedure which dispenses with the formality, delay and digression that would result from the issuance of process, service of complaint and answer, holding hearings, taking evidence, listening to arguments, awaiting briefs, submission of findings, and all that goes with a conventional court trial. The purpose of that procedure is to inform the court of events not within its own knowledge. The Rule allows summary procedure only as to offenses within the knowledge of the judge because they occurred in his presence.

Reasons for permitting straightway exercise of summary power are not reasons for compelling or encouraging its immediate exercise. Forthwith judgment is not required by the text of the Rule. Still less is such construction appropriate as a safeguard against abuse of the power.

We hold that Rule 42 allows the trial judge, upon the occurrence in his presence of the contempt, immediately and summarily to punish it, if, in his opinion,

delay will prejudice the trial. We hold, on the other hand, that if he believes the exigencies of the trial require that he defer judgment until its completion he may do so without extinguishing his power." 343 U. S. 1, 10-11.

Several recent cases have followed *Sacher*. See *United States v. Panico*, 308 F. 2d 125 (2d Cir. 1962); *United States v. Galante*, 298 F. 2d 72 (2d Cir. 1962); *Appeal of Levine*, 95 A. 2d 222, 372 Pa. 612 (Pa. Sup. Ct. 1953).

The soundness of this decision, permitting the Judge to defer the exercise of his summary contempt power till the completion of the trial, is again demonstrated by the facts of the instant case. The trial was a very sensitive one. The appellant had testified that he had been a close friend of the defendant for more than twenty years (287), and the appellant and the defendant had been named co-conspirators in the indictment. For the court to have punished the appellant for contempt during the course of the trial almost certainly would have affected the jury. Since Ungar was not only a People's witness, but closely identified with the defendant, a strong indication of judicial displeasure toward him might have prejudiced the defendant. While it might have been done out of the presence of the jury, in the words of Justice Jackson, "Only the naive and inexperienced would assume that news of such action will not reach the jurors." *Sacher v. United States*, *supra*, 343 U. S. 1, 10.

The appellant would distinguish *Sacher* on the ground that in the instant case the adjudication of contempt was not made immediately upon the conclusion of the trial, as

in *Sacher*, but several days after its completion. Nothing in the language or reasoning of that decision so limits it, however. Nor does the appellant indicate that he was in any way prejudiced by the procedure adopted by the court. On the contrary, he received written notice of the charge against him and several days to prepare an explanation—privileges to which he was not entitled under *Sacher*. The appellant was specifically warned at the time the contempt occurred that his conduct was considered contemptuous. Therefore, as stated in *Sacher*, 343 U. S. 1, 10-11, "No claim can be made that the judge awaited the close of the trial to pounce upon [him] for an offense unnoted at the time it occurred."

The appellant also asserts that *Sacher v. United States*, *supra*, was overruled by *Offutt v. United States*, 348 U. S. 11 (1954). Nothing in the Court's opinion in *Offutt* supports such an assertion. Indeed, Justice Frankfurter, writing for the majority in *Offutt*, begins his discussion of the applicable law with the statement, "We shall not retrace the ground so recently covered in the *Sacher* case * * *," 348 U. S. 11, 13. The decision in *Offutt* is based on a finding that there was a "continuous wrangle" between the court and counsel and that the trial court's adjudication of contempt was infused with personal animosity. In *Offutt*, the judge's personal embroilment with counsel was so extensive that the Court of Appeals reduced the sentence imposed on counsel for his contempt on the ground that the contempt was provoked by the judge. In the instant case the trial court's conduct was not motivated by personal enmity. The trial judge indicated that he did not consider the appellant's contemptuous conduct as a per-

sonal affront but as an obstruction to the due administration of justice (183-4, 187), and the New York Court of Appeals held "that appellant's contemptuous remarks were not a personal attack upon the trial judge * * *". Moreover, the decision in *Offutt* was specifically based on the Supreme Court's "supervisory authority over the administration of criminal justice in the federal courts," *Offutt v. United States, supra*, 348 U. S. 11, 13, and not on Constitutional grounds.

(4) The appellant was not deprived of due process by the court's denial of an adjournment

Although not obligated to do so in a summary contempt proceeding, the court in the instant case did give the appellant an opportunity to obtain counsel. It denied an adjournment sought on the ground that counsel was otherwise engaged only when it learned that the appellant knew at the time when he retained counsel that counsel would be so unavailable. The disposition of a request for an adjournment lies within the sound discretion of the trial judge. *Avery v. Alabama*, 308 U. S. 444 (1940); *Torres v. United States*, 270 F. 2d 252 (9th Cir. 1959); *United States v. Arlen*, 252 F. 2d 491 (2d Cir. 1958); *People v. Jackson*, 111 N. Y. 362 (1888). Surely, due process does not require that a court adjourn a case because of the nonavailability of counsel where the accused knowingly selects an attorney who will not be available. In addition, it must be remembered that the appellant was himself an experienced attorney, and the proceeding merely called for an explanation of his own conduct, a subject no one was better qualified to deal with than he himself. Yet, when the court called upon the appellant to show cause why he should not

be punished for contempt, he replied that he did not wish to participate in the proceedings (163). Nevertheless, he spoke at some length (163-203), and it was in no wise a lack of opportunity which caused him not to present a defense to the charge.

Conclusion

We respectfully submit, therefore, that the appeal should be dismissed because not taken in conformity to the requirements of 28 U. S. C. §1257(2) and because no substantial federal question has been presented.

FRANK S. HOGAN
District Attorney
New York County

H. RICHARD UVILLER
MALVINA HALBERSTAM
Assistant District Attorneys
Of Counsel

June 26, 1963

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FILED

JUL 8 1963

JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1962

No. [REDACTED] 167

SIDNEY J. UNGAR,

Appellant,

against

Honorable JOSEPH A. SARAFITE, Judge of the Court
of General Sessions of the County of New York,

Appellee.

REPLY TO MOTION TO DISMISS

EMANUEL REDFIELD,
Counsel for Appellant.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1962

No. 1139

SIDNEY J. UNGAR,

Appellant,

against

Honorable JOSEPH A. SARAFITE, Judge of the Court of
General Sessions of the County of New York,

Appellee.

REPLY TO MOTION TO DISMISS

Jurisdiction

It is sufficient to emphasize that the validity of Section 751 was challenged at the first opportunity available to appellant, in a motion for a rehearing (see motion papers, as part of transcript of record), after the Court of Appeals had construed the statute for the first time, approving the trial of the contempt proceeding before the judge making the charges at a hearing after the conclusion of the trial at which the contempt occurred. In the cases cited in the Statement as to Jurisdiction, pages 18 and 19 and 4, to which should be added *Great Northern Railway Co. v. Sunburst Oil Co.*, 287 U. S. 358, 366, this court under similar circumstances, took jurisdiction over such appeals.

Section 750 was also challenged by the appellant in the contempt proceeding, although not stated explicitly. Allowing that the appellant was without counsel in a hostile environment, the implicit challenge nevertheless appears throughout. Statement, page 17. This court in *Tomkins v. Missouri*, 323 U. S. 485, 487; *Pollard v. United States*, 352 U. S. 354, 359, recognized the sufficiency of implicit challenges under similar circumstances.

Timely federal challenges were made and passed upon by the Court of Appeals with respect to the application of Sections 750 and 751 to appellant, as was certified by that court. In any event, under 28 U. S. C. Section 2103, this Court can treat the appeal as a petition for a writ of certiorari and grant same.

The Questions Are Substantial

This is not the appropriate occasion to dwell on appellant's many disagreements with the facts as stated in the motion. The issues of law are too substantial to be clouded by essays on the facts.

But appellant must point to two, which unfortunately appear distorted.

The appellee states, page 4 and again page 8, that the appellant conceded in his Court of Appeals' brief, page 2, that the words which he uttered constituted a "prima facie contempt". That brief is not a part of the record here. But if it were, it would reveal the misinterpretation given it, because appellant there stated that it would be a contempt if the words had been said "deliberately and wilfully" and "with an intent to defy the dignity and authority of the court"; appellant then argued that no such facts or motives existed or were proved, and therefore there was no contempt. In any event, even if appellant's counsel had made such a concession what relevancy does it bear in this court?

The motion papers, page 5 and 7 refer to a "persistent" course of thirteen incidents of conduct. An analysis of said thirteen incidents will clearly reveal that these alleged "incidents of conduct" show that the appellant was not even remotely guilty of any contempt and that they only serve to create confusion. In any event, the sole charge of contempt was the one of November 25, 1960 therefore, the references at this time to other incidents is without relevancy. Nor was appellant charged with contempt for his manner of expression, bearing and attitude, for which appellee cites *Fisher v. Pace*, 336 U. S. 159, 161 for support. He was charged only for uttering words. If any "pictures" of the event were to be injected as an issue, they would favor the appellant, for they would depict a witness laboring under incredible emotional pressures and tensions in a courtroom in which the court was hostile toward him, and the invective of both prosecution and defense counsel was trained against him to make it appear as if he were the person on trial.

Appellant has demonstrated adequately in his Statement that substantial issues require that this court review this case. Aside from the challenge to the validity of the statute, there is presented the serious question arising from a state court, whether a judge who is personally embroiled with a witness may sit in judgment at a trial for an alleged contempt with which he has charged the witness, and in which the judge is complainant and prosecutor, as well as judge and jury. This is a substantial question which merits serious review by this court, since it invokes the due process sought to be protected by the Fourteenth Amendment.

***Sacher v. United States* Has Not Disposed of the Questions**

The appellee seeks to minimize the seriousness of the issues raised, by argument that the *Sacher* case is dispositive of them.

The answer is threefold:

First, *Sacher* arose in the federal courts, and it came before this court under its supervisory powers as an application of the federal contempt statute. The present case comes to this court under the Fourteenth Amendment for the protection of the life, liberty and property by due process against the acts of state officials.

Second, *Sacher* was cast aside by this court in *Offutt v. United States*, 348 U. S. 11, another federal case under the supervisory powers of this court. The court's opinion was written by Justice Frankfurter, who had objected to the *Sacher* ruling permitting summary dispositions after the trial had been concluded. See also, *Brown v. United States*, 359 U. S. 41, 61; Frederick Bernays Wiener, 48 A. B. A. Journal at 1024; Note, in 69 Harvard Law Review, 161 (1955); 3 Led 1862, Sect. 11; 64 ALR2d, 621, Sect. 12 (b).

Third, in *Sacher*, at the conclusion of the trial, the court then and there held *Sacher* in contempt. Here, however, appellee recognized the need for a plenary hearing, by commencing one, but did not accord it by depriving appellant of an adequate opportunity to defend, and by himself presiding at the contempt proceeding. Appellee argues that there was no need under the statute and decisions to provide a remedy other than a summary one before the same judge. Appellant contends to the contrary, that since the trial had been concluded before the contempt proceedings were initiated, he should have had a plenary

hearing before a judge other than the one with whom he was involved.

The appellee in capsulizing appellant's arguments, would make it appear as if appellant were stressing the deferring of the contempt proceeding, as his sole grievance. On the contrary, appellant places his greatest stress upon the claim that due process required that a judge should not have sat in judgment on his own contempt charges at a proceeding held days after the trial was concluded.

The reference by appellee in his motion to *Fisher v. Pace*, 336 U. S. 155, serves as an apt illustration of the tyranny that is latent in the power to punish for contempt especially, in a summary proceeding, as was that case, held before the same judge immediately at the contempt occurrence. The dissenting opinion of Justice Douglas, with the concurrence of Justice Black at page 163, and the dissenting opinions of Justice Murphy, page 166 and of Justice Rutledge, page 168, point up the flagrant abuses about which appellant complains, and give support to appellant's assertion of substantiality.

This case therefore presents to this court novel questions for review. It also affords this court an opportunity to re-examine the entire practice of contempt proceedings whereby a judge makes the charges, construes the law, passes on the facts and renders judgment.

EMANUEL REDFIELD,
Counsel for Appellant.

July 1, 1963.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1963

No. 167

SIDNEY J. UNGAR,

Appellant,

against

HONORABLE JOSEPH A. SARAFITE, Judge of the
Court of General Sessions of the County of New York,
Appellee.

ON APPEAL TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK.

BRIEF FOR THE APPELLANT

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IN THE
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OCTOBER TERM, 1963

No. 167

SIDNEY J. UNGAR,

Appellant,

against

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General Sessions of the County of New York,

Appellee.

ON APPEAL TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK.

BRIEF FOR THE APPELLANT

Opinions Below

The Court of Appeals did not write an opinion, but in both its remittiturs (R. 164, 165) that court made the following significant observation, pertinent to the issues raised here:

"However, we point out that where the alleged contempt consists of the making of charges of wrongdoing by the trial judge himself, he should, where disposition of the contempt charge can be withheld until after trial, and where it is otherwise practicable, order the contempt proceeding to be held before a different judge."

The Appellate Division did not render any opinion in either proceeding.

The trial term wrote no opinion.

Jurisdiction

(i) The jurisdiction of this court is conferred by 28 U.S.C. §1257(2). The following decisions sustain the jurisdiction of this court to review the judgments on appeal: *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282; *Whitney v. Calif.*, 270 U. S. 357, 360; *Louisville & Nashville R. Co. v. Higdon*, 234 U. S. 592, 598; *New York ex rel. Bryant v. Zimmerman*, 278 U. S. 63, 67; *Brinkerhoff-Faris v. Hill*, 284 U. S. 673, 677; *Cantwell v. Connecticut*, 309 U. S. 626; *Raley v. Ohio*, 360 U. S. 423, 434-6.

(ii) The judgments of affirmance by the New York Court of Appeals were made and entered in both cases on February 28, 1963. A notice of appeal to this Court was filed in the Supreme Court of the State of New York, Appellate Division, First Department on May 22, 1963 and another Notice of Appeal to this Court was filed in the Supreme Court of the State of New York, County of New York on May 23, 1963. The Notices of Appeal were from the respective courts. The Supreme Court of the State of New York is the successor to the Court of General Sessions.

(iii) Probable jurisdiction was noted on October 14, 1963.

Questions Presented

1. Is Section 750 of the Judiciary Law of the State of New York on its face, as construed and as applied, unconstitutional in that it violates the due process clause

of the Fourteenth Amendment to the Constitution of the United States?

2. Is Section 751 of the Judiciary Law of the State of New York as construed and as applied unconstitutional in that it violates the due process clause of the Fourteenth Amendment to the Constitution of the United States?

3. Was appellant, a lawyer since 1935, denied due process of law, when he was tried for contempt of court by the same judge who accused him of the crime?

4. Was appellant denied due process of law when he was tried and adjudged in contempt of court by said judge on December 13, 1960, 18 days after the incident of contempt and 7 days after the conclusion of the trial at which the incident occurred?

5. Was appellant denied due process of law at the said hearing on December 13, 1960 when the said trial judge in violation of the Rules of this court, refused the appellant and his counsel a reasonable adjournment of said hearing to enable him to prepare against such charges, considering in this question that the only indication and notice of the contempt proceeding was given by service of an order to show cause late Thursday afternoon, December 8, 1960 returnable the following Tuesday morning, December 13, 1960, with Saturday and Sunday intervening, during which a 17" snowstorm visited New York, paralyzing traffic on Monday and considering also that the appellant made claim in good faith that the alleged contemptuous words were true, but were unintentionally uttered as a result of the emotional pressures created by the judge in three consecutive court days on the witness stand at a trial in which he, a lawyer, although not a defendant and denied counsel to protect his rights,

was the subject of attack as a conspirator in the charges on trial?

6. Was appellant denied due process of law in that he was adjudged in contempt of court for having made the following statement while a witness at the trial under the following circumstances:

"I am absolutely unfit to testify because of your Honor's attitude and conduct towards me. I am being coerced and intimidated and badgered. The Court is suppressing the evidence."

The appellant had been on the witness stand on November 22, 23, 25, 1960 and on the latter day he made the foregoing remark (which according to the appellee's notice of motion forms the basis of the contempt charge). And the further circumstances are that immediately preceding the remark, the appellant had repeatedly and respectfully pleaded with the judge that he was emotionally upset and that he be given a recess to enable him to compose himself, verified by the fact that during a recess subsequently called, appellant had medical assistance and continued as a witness to completion of his testimony without further incident.

7. Was appellant denied due process of law in being tried for contempt by said judge who was hostile toward him from the inception of his role as a witness?

8. Was appellant denied due process of law in being tried for contempt by the judge who was personally involved and against whom appellant made personal attacks.

9. Was appellant denied due process of law by the failure of the Court of Appeals to decide this case in appellant's favor, although it held that in a contempt pro-

ceeding, where disposition of the contempt charge of wrongdoing by the trial judge can be withheld until after the trial, the accused should be tried before another judge!

Statutes Involved

Section 750 Judiciary Law of New York (McKinney's "Consolidated Laws of New York Annotated"): Power of courts to punish for criminal contempts

"A. A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts, and no others:

"1. Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority. . . ."

Section 751 of the Judiciary Law, insofar as pertinent herein, provides:

§751. Punishment for criminal contempts

"Punishment for a contempt, specified in section seven hundred and fifty, may be by fine, not exceeding two hundred and fifty dollars, or by imprisonment, not exceeding thirty days, in the jail of the county where the court is sitting, or both, in the discretion of the court. . . ."

"such a contempt, committed in the immediate view and presence of the court, may be punished summarily; when not so committed, the party charged must be notified of the accusation, and have a reasonable time to make a defense."

Section 752. Requisites of commitment for criminal contempt: review of certain mandates

"Where a person is committed for contempt, as prescribed in section seven hundred fifty-one, the particular circumstances of his offense, must be set forth in the mandate of commitment. Such mandate punishing a person summarily for a contempt committed in the immediate view and presence of the court, is reviewable by a proceeding under article seventy-eight of the civil practice act."

Section 755. When punishment may be summary

"Where the offense is committed in the immediate view and presence of the court, or of the judge or referee, upon a trial or hearing, it may be punished summarily. For that purpose, an order must be made by the court, judge or referee, stating the facts which constitute the offense, and which bring the case within the provisions of this section, and plainly and specifically prescribing the punishment to be inflicted therefore. Such order is reviewable by a proceeding under article seventy-eight of the civil practice act."

Statement

The appellant, who has been a lawyer in New York since 1935, was convicted by appellee of a criminal contempt of court on December 13, 1960 under Sections 750 and 751 of the Judiciary Law of the State of New York in that on November 25, 1960 in open court "in a loud, angry, disorderly, contemptuous and insolent tone directly tending to interrupt the proceedings of the court and to impair the respect due to the authority of the court," he made the following outburst while on the wit-

ness stand, where he had been for the third consecutive day:

"I am absolutely unfit to testify because of your Honor's attitude and conduct towards me. I am being coerced and intimidated and badgered. The court is suppressing the evidence."

The contempt proceeding was commenced by an order to show cause which stated, "Why he should not be punished for criminal contempt of court, committed on November 25, 1960, as hereinafter specified" (R. 67). The specification thereafter appears in the language just quoted (R. 90-91). Although the citation contains recitals of other material, the order and judgment of conviction confirms that the utterance on November 25, 1960 was the sole charge of contempt (R. 40):

"ORDERED AND ADJUDGED, that Sidney J. Ungar be and hereby is found guilty of criminal contempt of court committed on November 25, 1960, during the November 1960 Term continued, he having committed the acts hereinabove recited, and having shouted at the Court, 'I am being coerced and intimidated. The court is suppressing the evidence,' while said Court was in session, and in the immediate view, hearing and presence of the jury, by conduct which was wilfully contemptuous and insolent, and in a manner directly tending to interrupt the proceedings of the Court and to impair the authority due to it."

To complete the facts, it is necessary that the events prior to the incident be shown:

On January 20, 1960 an indictment was filed against one, Hulan Jack, charging him in conspiracy with appellant and others not named, with obstruction of justice

and accepting gifts and loans from appellant. Appellant was subpoenaed as the key witness and testified for seven days. A disagreement of the jury followed.

Appellant, believing that certain vital testimony establishing defendant's innocence had not been elicited, at the trial, even by defendant's counsel who considered appellant hostile, thereafter moved by formal motion before the trial judge to be made the court's witness and advise the court of such evidence, but the judge refused to consider the motion and disregarded it (R. 68-69).

A second trial was held before the same judge, during which the appellant was again a witness nominally on behalf of the prosecution but was ruled hostile (R. 32). He testified for four court days, November 22, 23, 25 and 28, 1960.

The appellee presided as trial judge at both trials, and evidently vexed with appellant about the first trial, recessed the trial on the morning of the second day of appellant's testimony, ordered appellant into chambers and admonished him about contempt (R. 84).

Appellant had been the subject of extensive publicity with consequent damage to his reputation. As the object of attack by both the district attorney and defense counsel, as the object of appellee's hostility. The appellant, after three unsuccessful pleas for a recess, in anguish and emotional stress, unintentionally blurted out what he felt. Appellant not only believed, then, but still believes that he was badgered and prevented from testifying fully as to his relationship and the transactions with Jack, which testimony if fully developed, would have proved Jack innocent (R. 106, 107; 26-32; 45-48; 52, 53, 54, 68-69; 84, 85-87; 92).

Prior to the incident of the alleged contempt, the district attorney pressed appellant, his own witness, with

questions which appellant could not understand and which he stated he could not answer properly and truthfully in the manner asked (R. 52-55).

Then the following ensued (R. 55-59):

"The Witness: If your Honor please, I want to recess at this point. I can't testify. I am too upset, and I am much too nervous. And I can't testify under these circumstances. I am not being a voluntary witness. I am being pressured and coerced and intimidated into testifying, and I can't testify under these circumstances.

The Witness: I can't testify, your Honor. I am shaking all over. And I must have a recess, I just am absolutely a bundle of nerves at this point, and I don't know what I'm doing or saying any more.

I ask for the privilege of leaving the stand, your Honor.

The Court: No, you will remain on the stand.

The Witness: I can't testify, I'm sorry, your Honor. I am not in any physical or mental condition to testify:

The Court: Mr. Witness, no one asked you anything. Nobody is questioning you. You are not testifying. We have taken a recess for about three minutes of silence, and we will take a few more minutes.

The Witness: I would like to leave the stand, your Honor.

The Court: No, you may not leave the stand.

The Court: Proceed, Mr. Scotti.

The Witness: I am not going to answer questions, your Honor. I am not going to testify in this confusion, and the Court nor anyone else will make me testify in this emotional state. I am absolutely unfit to testify because of your Honor's attitude

and conduct towards me. I am being coerced and intimidated and badgered. The Court is suppressing the evidence.

The Court: You are not only contemptuous but disorderly and insolent.

The Witness: I have asked for the privilege of leaving the stand for five minutes.

The Court: Put your question, Mr. Scotti.

Mr. Baker: May I renew my motion?

The Court: The motion is denied.

Mr. Baker: Exception.

Q. Mr. Ungar, did you tell Mr. Jack that Saturday morning that there was a conflict between your story to me and Mr. Bechtel's story to me? A. I can't answer any questions. I am not even concentrating on what you are saying. I can't even think clearly at this minute any more.

The Court: Do you refuse to answer?

The Witness: I don't know what he is talking about, Judge. I am an emotional wreck at this time. I am asking for a recess. I ask the right to get off this stand so that I can contain myself.

The Court: Do you refuse to answer the question, Mr. Ungar?

The Witness: I said I can't answer the question, your Honor.

The Court: Put the question, Mr. Reporter:

Mr. Scotti: Mr. Reporter, read the question.

The question was read by the Court Stenographer as follows:

Q. Mr. Ungar, did you tell Mr. Jack that Saturday morning that there was a conflict between your story to me and Mr. Bechtel's story to me?")

The Court: Let the record show that the defendant has remained silent and has not answered the question for four minutes.

Mr. Scotti: You mean the witness, your Honor.

The Court: What did I say?

Mr. Scotti: The Defendant.

The Court: Obviously I meant the witness. Very well, we will advance our luncheon recess.

Do not discuss the case, ladies and gentlemen, do not form or express any opinion as to the guilt or innocence of this defendant until the case is finally submitted to you. Since we are advancing the hour when we start our luncheon recess, we will get back here at 1:45. You may retire.

(The jurors then left the Court room and the following took place in their absence:)

Mr. Baker: There has been a statement made by the witness that he is emotionally or mentally incapable of testifying. So that the record would be crystal clear, I make a request of the Court to appoint a doctor to determine whether or not there is malingering on the part of the witness or anything of the sort.

The Court: In my judgment, this is as near as malingering could ever be determined from my observation.

The Witness: I join in that request, if your Honor please.

The Court: What is the ground of your application?

Mr. Baker: The ground of my application is, if the Court please, the law presumes that when a witness testifies he is to be lucid. This witness says he is not. Any testimony he gives may be prejudicial to the rights and interests of the defendant. That's the ground of my objection, and so that the record would be clear, whether this is malingering or not, there is a mental and emotional condition presently existing in this witness so that he could not be a competent witness to testify, all of which may be to the detriment of the defendant.

The Court: I shall reserve decision on your application and I shall direct the witness to remain in court until I decide it. The Court will take a recess until 1:45.

(After a short recess the Court returned to the courtroom, Mr. Baker and the defendant being present, and the following took place:)

The Court: Mr. Baker, I wanted to get both sides here. The reason I have asked Mr. Ungar to remain was because if I had made a decision, why, then, I could have acted on it. Since I haven't made a decision I see no point in having him remain here. He is entitled to take his luncheon recess the same as anybody else, but I didn't want to lose time if I could help it.

Mr. Baker: I am glad the Court indicated the purpose of asking the witness to remain.

The Court: That was the only purpose, because I said to you I reserve decision, and I thought I might be able to decide it and save time. Would it be a burden to give me another five minutes?

Mr. Baker: No, your Honor.

The Witness: Is your Honor addressing me?

The Court: Yes.

The Witness: No, it is not a burden, your Honor, because I was not malingering, and I have been shaking ever since this issue started.

The Court: I just want five more minutes and if I don't decide it by that time, then we will all go to lunch.

(A short recess was taken; the Court left the courtroom and returned.)

The Court: Mr. Ungar, I haven't made up my mind what course of action I should take. I think you ought to take a recess until 1:45. Let us see what the situation is at that time.

The court did nothing to determine appellant's emotional condition at that time or any other time. During the recess the appellant obtained medical assistance and continued his testimony that day and the subsequent trial date without incident (R. 61-64).

The following appears at R. 61:

"The Court: Now, Mr. Witness, before we took a luncheon recess you personally, as a witness, had asked for a recess. Do you recall that?"

The Witness: I do, your Honor.

The Court: Now that we have had the luncheon recess and you have come back, do you still ask for a recess?"

The Witness: Well, I would like to report to the Court that I went to the hospital and received an injection, and I think that I can proceed temporarily, in addition to the pills that I have taken this morning.

The Court: Very well.

Mr. Scotti: May I proceed, your Honor?

The Court: Yes."

At R. 63 the following is recorded:

"The Court: I thought it was obvious to everyone that when the witness resumed the stand at 1:45 P.M. after the luncheon recess, and the Court asked the witness whether his request for a recess while testifying on the stand, and before the announcement of the luncheon recess, still stood. The witness said he had been to a hospital to get a shot, and that he could.

Mr. Scotti: That he could proceed temporarily.

The Court: That he could proceed temporarily, and I thought that everyone then understood that the witness himself had concluded the issue by declaring that he was then able to proceed, and consequently made no formal declaration on the record.

To avoid any possible question about that I now deny the motion."

The Contempt Proceedings

At no time while appellant testified did the appellee cite or rule him as contemptuous. Nor did he seek an explanation for the emotional state of appellant on November 25, 1960 when he was requested by both appellant and by counsel for the defendant to do so (R. 58-64).

Instead, appellee waited until after the conclusion of the Jack trial on December 6, 1960. Thereupon on Thursday, December 8, 1960 at about 5 P.M. he caused an order to show cause to be served on appellant consisting of 24 pages in the printed record returnable on Tuesday morning, December 13, 1960, citing appellant for the contempt of November 25, 1960. It should be observed that although the appellant was charged with only the single incident of contempt on November 25, nevertheless, that charge is preceded by 13 recitals of other events which but served to perplex the appellant in attempting to defend. Appellant's burden to prepare his defense was thus compounded. The appellant thus had only about four days in which to meet the charges and those four days were interrupted by the intervening Saturday and Sunday during which a 17 inch snowstorm fell, paralyzing traffic on Monday. Appellant retained counsel on Saturday. But this counsel felt that he couldn't adequately prepare a defense unless an adjournment were obtained. On the return day on December 13, 1960, that counsel appeared with appellant and requested the adjournment on the ground of his lack of preparation and also because of his actual engagement at a trial in another court of record. It was denied. The denial was in breach of Rule VII of appellee's court which requires that in the event of an actual engagement by counsel in a trial in a court of record, the action shall be passed for the day or

until the trial is concluded. Whereupon, counsel withdrew, leaving appellant without representation. Appellant requested an adjournment because he could not go on without counsel. The request was denied (R. 93, 95, 96-101; 105).

Appellee stated that appellant had three weeks' notice of the contempt. This is not accurate. Nothing was done by appellee from November 25 to December 8 to put appellant on notice of charges. All that appellee did was to admonish appellant to "keep himself available". This, it is submitted, is not notice of contempt charges. Appellant had no notice until December 8 and until then could very well have had the impression that the incident, in the course of time, would subside and pass (R. 104).

Appellant objected, that he had a right to counsel, in view of the character of the proceedings, and that he was being deprived of counsel although he made all reasonable efforts to provide one (R. 104). Appellant also had a defense of good faith to the proceeding by showing the provocation, the lack of intent to be offensive and the emotional strain that led to the outburst.

Nevertheless, appellee proceeded, and adjudged petitioner in criminal contempt of court. He committed appellant to jail for ten days and fined him \$250.

Thereafter, the appellant appealed to the Appellate Division of the Supreme Court of the State of New York, First Department from the Mandate of Order and Judgment of Conviction dated December 13, 1960. Out of abundance of caution as to the proper procedure, the appellant also instituted a proceeding entitled "In the Matter of the Application of Sidney Ungar * * * to review a determination, etc." The Appellate Division dismissed the appeal on April 3, 1962 and affirmed the Order and

Judgment on April 3, 1962 in the application for a review (R. 4, 156).

Appeals were thereupon taken to the Court of Appeals from both judgments. That court on February 28, 1963 affirmed both orders, with the memorandum in each as set forth above (p. 1).

The repugnancy of Section 750 Judiciary Law to the federal constitution was raised at the contempt proceeding (R. 102); while not explicitly stated is nevertheless fairly comprised therein. It is also implicit throughout the entire proceedings in the original application before the Appellate Division.

The constitutionality of Section 751 Judiciary Law was raised explicitly before the Court of Appeals on a motion for a rehearing, because the construction for the first time of the statute permitting a judge to summarily sit in his own contempt charge after the trial had been concluded was first made at that stage and could not have been anticipated (R. 161-164). *Brinkerhoff-Faris Trust Co. v. Hill*, 281 U. S. 673, 677; *Herndon v. Georgia*, 295 U. S. 441; *Saunders v. Shaw*, 244 U. S. 317, 320; *Great Northern Railway Co. v. Sunburst Oil Co.*, 287 U. S. 358, 366; *Tomkins v. Missouri*, 323 U. S. 485, 487; *Pollard v. United States*, 352 U. S. 354, 359. Although the Court of Appeals denied the rehearing, it nevertheless certified that there was presented and necessarily passed upon whether the rights of the appellant to due process under the Fourteenth Amendment were violated. The challenge to repugnancy in its application is also implicit throughout the contempt proceedings before appellee and in the proceedings before the Appellate Division.

The federal questions sought to be reviewed were raised by appellant in the contempt proceeding in the first instance (R. 96-100), at which time counsel retained

by appellant sought an adjournment, but withdrew as counsel when the adjournment was refused. Appellant at that hearing objected to the validity of the hearing because of the postponement of contempt proceedings until after the trial (R. 101); that the charges of contempt are not defined by Section 750 Judiciary Law (R. 102); his right to counsel of his own choice and a reasonable opportunity to prepare a defense (R. 103-105); and that the contempt proceeding should be heard by another judge especially because of his marked hostility and bias (R. 108-109).

SUMMARY OF ARGUMENT

In a prosecution of a charge for a criminal contempt, the accused must be accorded due process of law at every stage of the proceeding as in any other prosecution. The errors of past misconceptions should be corrected. Moreover, in a case such as this one, where the trial of the contempt charge occurs subsequent to the termination of the case at which the alleged contempt occurred, no reason prevails for evading the requirements of due process.

It is fundamental therefore that the accused be prosecuted only under a law certain enough so that people can know what is forbidden and not under one such as the one in the present case, whose interpretation by the judge is *ad hoc* legislation.

Due process minimally, forbids the same judge to sit in a contempt proceeding held after the termination of the case at which the alleged contempt occurred before him. This would be true, whether or not he is adverse to the accused, embroiled with him or just vindicating the supremacy of the court. In such instances, he is involved in his own case and cannot be considered

impartial. In practice, it would be impossible for him to make rulings relating to himself judicially, if he were called as a witness. In this case, where he is an adversary of the accused, the doctrine is easier of application.

Due process also insists that the accused be represented by counsel of his own choice and this right be an effective one in which no obstacles are placed in the route to such selection. Appellant was deprived of an effective opportunity to be represented by counsel.

The words of alleged contempt were uttered in an atmosphere of hostility, confusion and emotional strain. Even if the appellant's conduct could be interpreted to fall within the scope of the vague statute under which he was accused, nevertheless, his conduct in the context in which it appears would not be held contemptuous without violating due process.

ARGUMENT

Introduction

It is elementary that a fair trial must be held by an impartial judge. Impartiality implies freedom from subjective influences, such as those arising from being the accuser in the charges. Indeed, in our society, the separation of the functions of the trial jury from the grand jury at the considerable cost such arrangement involves, attests to this keystone of justice. Another fundamental talisman of justice is that the accused have a full trial with the effective right to counsel of his own choice.

Yet in contempt proceedings, especially where the alleged contempt occurs in the presence of the court, assertions have been made that a judge may summarily

punish without even making inquiry into the cause of the conduct or into factors that may excuse it. This departure from normal requirements of fair play stirs interest in the origin of the doctrine upon which it rests. Frankfurter and Landis made a study of the history of the doctrine ("Power to Regulate Contempt", 37 Harvard Law Review 1010). They reveal that the justification was found in an unpublished opinion of Chief Justice Wilmut in *The King v. Almon* (1765), 24 Law Q. Rev. 184, in which assertion was made that it stemmed from immemorial usage. Subsequent researches by Sir John Charles Fox proved the "immemorial usage" to be without basis, in "The Summary Process to Punish Contempt", 25 Law Q. Rev. 238, cited by Frankfurter and Landis, *op. cit.* 1047. Whatever usage existed was found in the Courts of Star Chambers and in occasional assertions during the 17th and 18th centuries.

For a hundred and more years the judiciary has been trying to free itself from the error. Frankfurter and Landis assert, for courts must guard against arbitrariness and search for other means to attain the end sought (p. 1051).

Mr. Justice Black who is not given to genuflection to the British concepts and practices which the Bill of Rights sought to nullify, said this in *Green v. United States*, 356 U. S. 156 at 212:

"But far more significant, our Constitution and Bill of Rights were manifestly not designed to perpetuate, to preserve inviolate, every arbitrary and oppressive governmental practice then tolerated, or thought to be, in England. Cf. *Bridges v. California*. 314 U. S. 252, 263-268. Those who formed the Constitution struck out anew free of previous shackles in an effort to obtain a better order of

government more congenial to human liberty and welfare. It cannot be seriously claimed that they intended to adopt the common law wholesale. They accepted those portions of it which were adapted to this country and conformed to the ideals of its citizens and rejected the remainder. In truth there was widespread hostility to the common law in general and profound opposition to its adoption into our jurisprudence from the commencement of the Revolutionary War until long after the Constitution was ratified."

And to those observations should be added those in *Pennekamp v. Florida*, 329 U. S. 331, 348, that a judge must be made of sufficient strength to be insensitive to the give and take of litigation.

Since due process demands the fundamental requirements of an impartial judge and of a full hearing, with representation by counsel, it follows that such rights must be accorded to an accused. Even if it were admitted, for the sake of argument, that the anomalous doctrine of summary proceedings is necessitated by the practical needs of maintaining order at a pending trial, such doctrine would have no validity if the prosecution for the contempt took place, like this case, after the trial was terminated. And this would be true whether the conduct took place in the presence of the judge or not. See *Toledo Newspaper Co. v. United States*, 247 U. S. 402, 425, where Justices Holmes and Brandeis, in dissent stated, "when there is no need for immediate action contempts are like any other breach of law and should be dealt with as the law deals with other illegal acts."

If due process under the Constitution compels the conclusions stated here, then it is seasonable for this court to state, here and now, that such is the requirement of

due process. If revision of the errors of the past is required, as several justices of this court have indicated, then this case is ripe for such decision. Notable examples of revision of constitutional doctrine are *Erie Railroad v. Tompkins*, 304 U. S. 64 which discarded *Swift v. Tyson*, 16 Peters 1, after error of almost 100 years and *Brown v. Board of Education*, 347 U. S. 483 which overruled the 60 year, but erroneous constitutional doctrine of *Plessy v. Ferguson*, 163 U. S. 537.*

Mr. Justice Black urged revision in *Green v. United States*, 356 U. S. 165, at 196 (concurred in by the Chief Justice and by Mr. Justice Douglas):

"The power of a judge to inflict punishment for criminal contempt by means of a summary proceeding stands as an anomaly in the law. In my judgment the time has come for a fundamental and searching reconsideration of the validity of this power which has aptly been characterized by a State Supreme Court as, 'perhaps, nearest akin to

* It serves no useful purpose to marshal a list of justices of this court who voted in the past for or against a doctrine. Cf. Mr. Justice Frankfurter, when concurring in *Green v. United States* was favorably impressed by the list of judges who previously had voted to support summary contempt proceedings. This is in startling contrast with his repudiation of the doctrine 35 years earlier when more than two-thirds on that list had already indicated their preference. ("At least let us not import into the Constitution of the United States discredited practices of Stuart England" *op. cit.* 1058). In any rectification of existing rules of law, it is presumed that the prior rule had acceptance by other judges. *Tyson v. Swift*, for example, during its 100 year career was notable for its popularity among federal judges. Tabulating predecessors can only be loaded against change, for if a doctrine endured any length of time, it was accepted by others, and the scale would necessarily be weighted against change by numbers. A more credible test is: has experience shown that the rule does not comport with constitutional obligations, especially those of due process. " * * * the Supreme Court is not likely to embalm exploded history in the Constitution" (Frankfurter and Landis, *op. cit.* 1012).

despotic power of any power existing under our form of government'."

Again at page 198:

"Summary trial of criminal contempt, as now practiced, allows a single functionary of the state, a judge, to lay down the law, to prosecute those who he believes have violated his command (as interpreted by him), to sit in 'judgment' on his own charges, and then within the broadest kind of bounds to punish as he sees fit. It seems inconsistent with the most rudimentary principles of our system of criminal justice, a system carefully developed and preserved throughout the centuries to prevent oppressive enforcement of oppressive laws, to concentrate this much power in the hands of any officer of the state. No official, regardless of his position or the purity and nobleness of his character, should be granted such autocratic omnipotence."

The New York Court of Appeals itself had some misgivings about the procedure of which appellant complains, for while affirming, it said in its memorandum:

"However, we point out that where the alleged contempt consists of the making of charges of wrongdoing by the trial judge himself he should where disposition of the contempt charge can be withheld until after trial and where it is otherwise practicable, order the contempt proceeding to be tried before a different judge."

I

Section 750 Judiciary Law as construed and applied is unconstitutional in that it is vague and uncertain.

Whatever basis there may have been at common law for summary powers to punish for a contempt, the source of that power in New York is found in the statute, Sections 750-752, 755, Judiciary Law. Noteworthy is the opening sentence of the law, expressly limiting the power to punish to the following acts, and *no other*, thus circumscribing any claims under the common law.* *People v. Oyer, etc. Court*, 36 Hun 277, affirmed 101 N. Y. 245.

The appellant was prosecuted under subdivision 1 of Section 750, of the Judiciary Law which provides for punishment of disorderly, contemptuous, or insolent behavior in the presence of the court and which tend to interrupt the proceedings or to impair the respect done to it. He was found guilty for conduct which was "wilfully contemptuous and insolent and in a manner directly tending to interrupt the proceedings of the Court and to impair the authority due to it" (R. 40).

Under existing practice the vague language permits meaning to be given to it by the very same judge who is to adjudge and sentence the accused. All of which is reminiscent of Lewis Carroll in "Through the Looking Glass":

"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."

*It should be noted, however, that Sections 600, 601, 602 Penal Law, provide a separate crime, a misdemeanor, and appeared before this Court in *Regan v. New York*, 349 U. S. 58; see also *People v. DeFeo*, 308 N. Y. 595.

"The question is," said Alice, "whether you can make ~~words~~ mean so many different things."

"The question is," said Humpty Dumpty, "which is to be the master—that's all."

How is an accused to know what is proscribed or be able to prepare to meet the charges? The courts in early constructions of the statute realized that the offense of contempt was not clearly defined and warned that caution was necessary in proceedings to punish. *Rutherford v. Holmes*, 5 Hun 317, affirmed 66 N. Y. 368; *People v. Oyer etc. Court*, 36 Hun 277, affirmed, 101 N. Y. 245; *Sherwin v. People*, 100 N. Y. 351; *People v. Riley*, 25 Hun 587.

Section 750 is vague and indefinite. It violates the principle enunciated in *Winters v. New York*, 333 U. S. 507 that, "There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment." The uncertainty in the statute provides a judge with an elastic weapon whereby he can give the words the meaning he chooses.

In *Commonwealth v. Carpenter*, 91 NE (2d) 666 the Supreme Court of Massachusetts declared a statute unconstitutional because it rendered a person guilty of disorderly conduct who loitered for 7 minutes after he was ordered by a policeman to move on. That court held the statute to lack standards capable of evaluation.

See also, *Thompson v. Louisville*, 362 U. S. 199, where the case turned on the sufficiency of the evidence in a charge of "loitering" and "disorderly conduct."

The New York statute gives the judge *ad hoc* legislative powers to define in his own cause, what is contemptuous or disorderly. This is clearly endowment of autocratic power which can be exercised with terror and tyranny.

Nor does the age of a statute, like Section 750, while impressive, save it from constitutional attack. *Winters v. New York, supra.*

II

Section 751, Judiciary Law as construed and applied is unconstitutional as a denial of due process.

The Court of Appeals in its certificate noted that the appellant presented and that court passed upon the federal question of "the trial judge's invoking of summary power under §751 of the Judiciary Law seven days after the end of the trial during which the contempt was committed," and the "same trial judge's presiding in the resulting contempt proceeding even though he was the judge 'personally attacked'". It thus construed the statute to enable the institution of summary contempt proceedings after the commission of the offense. It also construed the statute so as to permit a judge in a summary contempt proceeding to sit in his own case. It is submitted that the statute so construed denies the appellant due process of law. Since Section 751 is the source for punishment of summary contempt, the Court of Appeals construed it (as its certificate indicates) to permit summary trials before the same judge who is involved.* The statute therefore is subject to the infirmities argued in the next point, under the heading, "The Trial of the Contempt proceeding by the Same Judge, etc." For the sake of brevity the arguments are not here repeated, but are incorporated herein.

* Section 755 (p. 6 *supra*) expressly provides for summary proceedings. Although it was not referred to in the challenges below, nevertheless, its scope is embraced within the construction given to Section 751, as formulated by the certificate of the Court of Appeals.

III

The trial of the contempt proceeding by the same judge who charged appellant with contempt was a denial of due process, especially when the judge was in an adverse position to him.

(1)

The appellee postponed the contempt proceedings against appellant until after the conclusion of the Jack trial, when he served a notice of hearing with supporting papers on the appellant. The appellee contended in the courts below that the proceeding was nevertheless summary.* And from that he concluded that in such proceeding due process is not required—the judge, sitting in his own cause, may convict a contemnor without affording him an opportunity to explain or defend himself, deprive him of counsel and of an opportunity to call witnesses on his behalf.

The procedure pursued by the appellee of postponing contempt proceedings until after the trial and proceeding on papers has complicated the issues. The procedure is not that of *Sacher v. United States*, 343 U. S. 1, where the alleged contempts were in open court and contempt pro-

* The dismissal of the appeal by the Appellate Division and its rendition of judgment on the merits in the Article 78 proceeding, the remedy provided for review of summary contempt proceedings would leave the inference that the Appellate Division treated this case as a summary one. The affirmance by the Court of Appeals of the dismissal leaves the same implication. In this connection, it should be observed that while affirming the dismissal, the Court of Appeals nevertheless, in its remittitur passed judgment on the proceedings by its admonition, and subsequently, in amending its remittitur stated it had passed on the merits of the substantive issues raised by appellant, thus leaving the conclusion that it passed on the merits of the appeal.

ceedings were postponed until after the end of the trial, at which time the judge then and there, without commencing a proceeding on papers, convicted the accused. Nor is this case one where the alleged contempt occurred outside the presence of the trial judge.

Appellant argues here, however, that irrespective of whether the proceedings are labelled summary or non-summary, he was denied due process at a trial of contempt proceedings under a statute, as construed by the courts, authorizing summary proceedings to be held by the same judge who accused the appellant of contempt and was personally the subject of attack by appellant.

(2)

The indisputable fact is that the judge who tried the contempt proceeding was the same person who accused the appellant of contempt of court. And it is also an undisputed fact that the proceeding was commenced on December 8, 1960 returnable December 13, 1960, for an alleged contempt of court committed on November 25, 1960 and after the trial at which the contempt was committed had been concluded.

The charge of contempt was that on November 25, 1960, the appellant while testifying as a witness in a criminal case before appellee, said in open court,

"I am absolutely unfit to testify because of your Honor's attitude and conduct towards me. I am being coerced and intimidated and badgered. The Court is suppressing the evidence." (R. 67-68; 40)

A serious question is thus presented: Was the appellant denied due process when the judge who charged the contempt undertook to try and adjudge the appellant?

In the administration of justice, it has been axiomatic that a judge should not sit in judgment in a cause in which he has an interest, especially that of accuser. In *re Murchison*, 349 U. S. 133, this court reviewed a prosecution for contempt that arose under state practice, which permitted a judge to sit in judgment in a cause in which he was the accuser. *Murchison* posed the question of due process, for there a one-man grand jury consisting of a single judge, charged witnesses who appeared before him with contempt. Thereupon, the same judge tried and adjudged them in contempt. This violation of the elementary integrity of justice was intolerable to the sense of fairness of this court, which condemned the action as a violation of due process. This court there said (136):

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' *Tumey v. Ohio*, 273 U. S. 510, 532. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt v. United States*, 348 U. S. 11, 14."

Page 138:

"As a practical matter it is difficult if not impossible for a judge to free himself from the influence of what took place in his 'grand-jury' secret session. His recollection of that is likely to weigh far more heavily with him than any testimony given in the open hearings. * * *

"* * * Moreover, as shown by the judge's statement here a 'judge-grand jury' might himself many times be a very material witness in a later trial for contempt. If the charge should be heard before that judge, the result would be either that the defendant must be deprived of examining or cross-examining him or else there would be the spectacle of the trial judge presenting testimony upon which he must finally pass in determining the guilt or innocence of the defendant."

See also *Re Oliver*, 333 U. S. 257; *Tumey v. Ohio*, 273 U. S. 510.

Likewise, this court in *Offutt v. United States*, 348 U. S. 11, a summary proceeding, overruling *Sacher v. United States*, *supra* by implication, had occasion to point up the offensiveness of the judge who undertakes to punish for a contempt in his own cause. *Offutt* was decided later than *Sacher*. Yet it held that where there was personal involvement by the judge with the accused, the contempt proceedings should be held before another judge. See also *Cooke v. United States*, 267 U. S. 517; *Brown v. United States*, 359 U. S. 41, 61; *Wiener*, in 48 A.B.A.J. 1024; Note, 69 *Harvard Law Review*, 161 (1955); 3L. ed. 1862, Sect. 11; 64 ALR 2d, 621, Sect. 12(b).

If any doubt lingered that *Sacher* had been overruled, this court dispelled such doubts by its decision this term in *Panico v. United States*, No. 45, October 21, 1963, 11 L. ed.

2d 1. In that case the petitioner had been adjudged in criminal contempt of court for his conduct at a trial in which he was a defendant. For his conduct at the trial, he was summarily adjudged in contempt *after* the conclusion of the trial. This court held that the petitioner was entitled to a plenary hearing "to determine the question of petitioner's criminal responsibility for his conduct."

Fisher v. Pace, 336 U. S. 155, serves as an apt illustration of the tyranny that is latent in the power to punish for contempt especially, in a summary proceeding, as was that case, held before the same judge immediately *at* the contempt occurrence. The dissenting opinion of Justice Douglas, with the concurrence of Justice Black at page 163, and the dissenting opinions of Justice Murphy, page 166 and of Justice Rutledge, page 168, point up the flagrant abuses about which appellant complains.

Since the appellant stood in an adversary relationship with appellee by reason of appellant's attack on him, it is all the more reason that *Offutt* should apply here.* *Craig v. Hecht*, 263 U. S. 255, 279.

(3)

Whatever be the state of the law now on the subject of summary and non-summary contempt proceedings, three justices of this court (the Chief Justice, Justice Black and Justice Douglas) called upon the court in *Green v.*

* True, *Offutt*, *Panico*, *Sacher* and *Green* were federal cases, decided under the supervisory powers of this court. Nevertheless, the principles of due process that were drawn into the decisions apply to this state case. A trial under due process must meet the test of fairness whether it be in a federal or in a state court. Because of the challenges to the validity of the state statutes which deny appellant the protections he seeks under the federal constitution, this case presents a broader scope and significance than the federal cases controlled by the supervisory powers of this court.

United States, 356 U. S. 165, 193 to reconsider this most fundamental aspect of due process, inherent in even summary proceedings, that there shall be an impartial judge in a cause, *whether the offense was committed in the presence of the court or not.*

Justice Black, after stating the words quoted at pp. 28-29, *supra*, took great pains to condemn all summary trials of criminal contempt in these words:

Indeed if any other officer were presumptuous enough to claim such power I cannot believe the courts would tolerate it for an instant under the Constitution. Judges are not essentially different from other government officials. Fortunately they remain human even after assuming their judicial duties. Like all the rest of mankind they may be affected from time to time by pride and passion, by pettiness and bruised feelings, by improper understanding or by excessive zeal. Frank recognition of these common human characteristics, as well as others which need not be mentioned, undoubtedly led to the determination of those who formed our Constitution to fragment power, especially the power to define and enforce the criminal law, among different departments and institutions of government in the hope that each would tend to operate as a check on the activities of the others and a shield against their excesses thereby securing the people's liberty.

When the responsibilities of lawmaker, prosecutor, judge, jury and disciplinarian are thrust upon a judge he is obviously incapable of holding the scales of justice perfectly fair and true and reflecting impartially on the guilt or innocence of the accused. He truly becomes the judge of his own cause. The defendant charged with criminal contempt is thus denied what I had always thought to be an indis-

pensable element of due process of law—an objective, scrupulously impartial tribunal to determine whether he is guilty or innocent of the charges filed against him. In the words of this Court: “A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome . . . Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer.” *In re Murchison*, 349 U. S. 133, 136-137. Cf. *Chambers v. Florida* 309 U. S. 227, 236-237; *Tumey v. Ohio*, 273 U. S. 510; *In re Oliver*, 333 U. S. 257.

(4)

Moreover, whatever justification may be discerned in permitting a judge to summarily punish at the time of the offense loses validity with respect to proceedings to punish for the offense, as here, 18 days after the offense and conclusion of the trial at which it took place. It might be argued that a judge himself should be empowered to summarily try and punish for an offense committed in his presence as a means towards keeping order at the trial and efficiently dispatching it (although contrary argument could be made that there are other means of attaining such results without the necessity of empowering a judge with such autocratic powers).

But the end sought by the grant and exercise of such powers becomes non-existent after the trial is concluded. The emergency gone, contempt proceedings after the trial should therefore be respected with the due process, guaranteed in plenary adjudications.

Furthermore, the opportunity for the appellant to prove his emotional state was also impaired, since the judge did nothing at the time of the incident to verify his own accusation that the appellant was malingering, although he took two recesses for that purpose (58-63). *Panico v. United States*, 11 L. ed. 2d, 1. Attempting to prove it 18 days later might be a futility (58). *Toledo Newspaper Co. v. United States*, 247 U. S. 402, 425.

(5)

Even the Court of Appeals in this case recognized the unfairness of the procedure (p. 1, *supra*).

Since the contempt charge had been withheld in this case until after the trial of the action in which the contempt occurred, the Court of Appeals should have made its pronouncement effectual by reversing the proceedings. Unfortunately, its statement was of no aid to the appellant. It is merely an admonition for use in subsequent cases by those who might ferret it out. Appellant was thus denied due process of law. He was not given the benefit of the construction of the statute on his own appeal, but instead, was the guinea pig for the benefit of others. *Lanzetta v. New Jersey*, 306 U. S. 451.

(6)

Appellant did make a personal attack on appellee by accusing appellee of badgering him and suppressing the evidence. They were consequently cast in adversary roles. This is contrary to the finding of the Court of Appeals that no personal attack was made. This court, however, may review such finding because it affects the constitutional right claimed to have been denied. *Chambers v. Florida*, 309 U. S. 227, 228; *Niemotko v. Maryland*, 340 U. S. 268, 271.

Fulfillment of due process should not be dependent upon distinction whether the contempt was an attack upon the judge personally or whether it was an offense against the dignity of the court and good order. Justice Jackson in *Sacher* well pointed out that there really is no separation, because the offense is directed at the judge as a person although he is sitting as a court. See also, *Craig v. Hecht*, 263 U. S. 255, 279.

(7)

In any event, in this case, the appellee felt himself personally offended when the appellant made the statement for which he was charged with contempt. The petitioner had stated, "I am absolutely unfit to testify because of your Honor's attitude and conduct towards me." Thereupon the appellee replied; "You are not only contemptuous but disorderly and insolent" (R. 57).

(8)

Indeed, it was most essential that the contempt proceeding be held before an impartial judge, because the judge was hostile toward appellant from the very inception of his several days on the witness stand; furthermore, there was a genuine issue whether the alleged contemptuous words were compelled by the emotional distress of three days of testifying in a hostile atmosphere (R. 84-86), and moreover, the judge as an adversary would have been subject to examination as a witness and as such, could adjudicate objections raised during his testimony (*Re Murchison*; 349 U. S. 133, 138).

IV

The appellant was not accorded due process of law in the contempt proceeding.

This Court, in *re Oliver* 333 U. S. 257 and recently reaffirmed in another state case, in *re Green*, 369 U. S. 689 (1962), held that in contempt proceedings due process is satisfied if the following conditions are met: 1) the accused must be advised of the charges; 2) he must have a reasonable opportunity to meet the charges by way of (a) defense or (b) explanation; 3) he must have the right to be represented by counsel; and 4) he must be afforded an opportunity to call witnesses.

These conditions do not exact more than fairness requires, since a contempt proceeding is a criminal prosecution. Holmes, J., in *Gompers v. United States*, 235 U. S. 604, 610-611.

None of those conditions were met in this case, except that the appellant received notice of the proceeding and the lengthy charges four days before the return date.

The appellant was denied a reasonable opportunity to meet the charges by way of defense or explanation and was in effect, denied counsel because counsel could not represent the appellant upon the refusal of a short adjournment by the court to enable him to prepare.

The contempt proceeding was begun by the service of an order to show and supporting papers, which in the printed record occupy 24 pages (R. 67-91) of 14 complex and confusing specifications in late afternoon of Thursday, December 8, 1960, returnable on Tuesday, December 13, 1963. During the weekend of December 10 and 11, a 17 inch snowstorm paralyzed traffic and work in New York (R. 35). Appellee, with the copious assistance

of the district attorney's staff had devoted six days to preparing the moving papers.

Nevertheless, when appellant appeared at the hearing on December 13, he was denied a short adjournment in order to enable appellant's chosen counsel, who had another court engagement that day, to prepare for the hearing (R. 96-97). Counsel had to withdraw his appearance since he could not obtain the adjournment for the purpose of enabling him to prepare an adequate defense. Thereupon, the appellee immediately proceeded to try appellant without counsel and without reasonable opportunity to prepare his defense or give explanation (R. 100). Appellant pleaded with the court to afford him an opportunity to prepare a defense against the contempt charge. He stated that he had not committed a contempt or ever intended to do so. Appellant required time too, to support his defense with proof of medical testimony that the words allegedly contemptuous were the product of an emotional strain and that he had received medication during the recess on November 25, to alleviate the strain. But the court disregarded these pleas, and adjudged him in contempt (R. 102, 108).

Considering the volume of the paper work alone involved in the contempt proceedings, the researches required of the exhibits of testimony of the trial at which appellant testified the complex and difficult questions of statutory and constitutional law involved and the medical testimony to be collected, it is obvious that counsel could not adequately prepare himself in the two days available. Yet here, counsel retained on Saturday for the hearing on Tuesday also had another court engagement. The appellant's request for an adjournment was under the circumstances reasonable. It could not have mattered for the prompt vindication of the court whether an adjournment

for 8 days or 18 days was granted. No one would have been prejudiced. Yet, appellee refused to grant one (R. 412).

It cannot be said that the appellant had 18 days notice, because he had been cautioned at the trial that he was contemptuous, or that he should "hold himself available"—whatever such words signify. His notice began when he was served on December 8 with a notice of a proceeding. Until that time he had no charges against him against which to prepare. For all he knew, the episode might have blown over.

Therefore, when the adjournment was denied and counsel withdrew from the case, the appellant was denied the opportunity to be represented by counsel; he was denied an opportunity to adequately defend or explain himself and was denied the opportunity to call witnesses in his behalf.

Even state practice should have accorded him the adjournment. Evidently, the hostile atmosphere in which the proceeding was conducted deprived him of those constitutional protections. The refusal of an adjournment was a violation even of the Rules of appellee's own court. Rule VII of the Rules of the Court of General Sessions of the County of New York states:

"No adjournment of trial shall be granted by reason of engagement of counsel . . . unless it be made to appear by affidavit that counsel . . . is actually engaged in the trial of a case in a court of record of the State of New York, in which event the trial of the action shall be passed for the day or until such argument or trial is concluded . . ."

See also, *Matter of Rotwein*, 291 N. Y. 116; *People v. McLaughlin*, 291 N. Y. 483; *People v. Koch*, 299 N. Y. 378, 381; *People v. Gordon*, 262 A.D. 534, 536.

V

The conduct of the appellant was not contemptuous under the circumstances of provocation and emotional distress; and a construction of the vague statute to render appellant guilty is a denial of due process.

Section 750 Judiciary Law, under which appellant was prosecuted, empowers a court to punish for a criminal contempt when the conduct is disorderly, contemptuous or insolent, directly tending to interrupt the court's proceedings and impair its respect. Under this vague statute this appellant was adjudged guilty on the single charge that on November 25, 1960 after 3 days of testimony and after he had repeatedly pleaded with the court in vain for a recess, he made the accusation against the judge.

His words cannot be assessed in a vacuum if determination is sought whether they are of the character the statute condemns.

It is necessary to read the record of the events prior to those words and subsequent thereto. It must be borne in mind that the appellant, a lawyer, had been named in the indictment of ~~Alan~~ Jack of conspiring with Jack to obstruct justice and for having given Jack gifts or loans in violation of law. Although the appellant was not a defendant, he as a lawyer and as a citizen was actually exposed as an alleged co-conspirator to the attendant publicity of pretrial and long trial and retrial procedures. As a witness called by the People he was subject to the inquisition which put his character and reputation to public view. It is understandable that a person in such position would be under a strain and would be cautious in his answers, even to the point of insisting as a party to the transaction on bringing out the "whole story", where he felt there was

nobody at the trial who was interested in doing so. Even if such conduct be deemed offensive, it is nevertheless, understandable. Yet, the appellee and the district attorney, whose witness appellant was, took a hostile attitude toward him, from the very beginning of his testimony, intimating that appellant had been responsible for the retrial that had been necessitated through disagreement of the jury at the first trial where petitioner had testified for 7 days. An example appears at 84:

"The Court: Now, Mr. Witness, this case was tried once before and took considerable time. You were a witness for many days. A number of incidents occurred in that trial which, in my judgment, directly tended to interrupt the proceedings of the Court and to impair the respect due to the authority of the Court, and you were the one who created those incidents, in my judgment."

A picture of the trial would depict appellant, a witness laboring under emotional pressures and tensions in a courtroom in which the court was hostile toward him, and the invective of both the prosecution and defense trained against him to make it appear as if he were the person on trial. In fact, at one time during the course of Jack's trial, the appellee subconsciously referred to appellant as "the defendant" (R. 57 fol. 80).

With the emotional strain building up from questions which the witness in good faith felt he could not answer fully and honestly, it is not surprising that on the third day of testimony, the following respectful plea ensued, (R. 55):

"The Witness: If your Honor please, I want to recess at this point. I can't testify. I am too upset, and I am muc' too nervous. And I can't testify under these circumstances. I am not being a vol-

untary witness. I am being pressured and coerced and intimidated into testifying, and I can't testify under these circumstances."

Then followed (R. 56):

"The Witness: I can't testify, your Honor. I am shaking all over, And I must have a recess, I just am absolutely a bundle of nerves at this point, and I don't know what I'm doing or saying any more.

I ask for the privilege of leaving the stand, your Honor.

The Court: No, you will remain on the stand.

The Witness: I can't testify, I'm sorry, your Honor. I am not in any physical or mental condition to testify.

The Court: Mr. Witness, no one asked you anything. Nobody is questioning you. You are not testifying. We have taken a recess for about three minutes of silence, and we will take a few more minutes.

The Witness: I would like to leave the stand, your Honor.

The Court: No, you may not leave the stand."

The court disregarded those repeated requests, and proceeded (R. 56):

"The Court: Proceed, Mr. Scotti.

The Witness: I am not going to answer questions, your Honor. I am not going to testify in this confusion, and the Court nor anyone else will make me testify in this emotional state. I am absolutely unfit to testify because of your Honor's attitude and conduct towards me. I am being coerced and intimidated and badgered. The Court is suppressing the evidence.

The Court: You are not only contemptuous but disorderly and insolent.

The Witness: I have asked for the privilege of leaving the stand for five minutes.

The Court: Put your question, Mr. Scotti.

Mr. Baker: May I renew my motion?

The Court: The motion is denied.

Mr. Baker: Exception.

Q. Mr. Ungar, did you tell Mr. Jack that Saturday morning that there was a conflict between your story to me and Mr. Bechtel's story to me? A. I can't answer any questions. I am not even concentrating on what you are saying. I can't even think clearly at this minute any more.

The Court: Do you refuse to answer?

The Witness: I don't know what he is talking about, Judge. I am an emotional wreck at this time. I am asking for a recess. I ask the right to get off this stand so that I can contain myself.

The Court: Do you refuse to answer the question, Mr. Ungar?

The Witness: I said I can't answer the question, your Honor.

The Court: Put the question, Mr. Reporter:

Mr. Scotti: Mr. Reporter, read the question.

(The question was read by the Court Stenographer as follows:

'Q. Mr. Ungar, did you tell Mr. Jack that Saturday morning that there was a conflict between your story to me and Mr. Bechtel's story to me?')

The Court: Let the record show that the defendant has remained silent and has not answered the question for four minutes.

Mr. Scotti: You mean the witness, your Honor.

The Court: What did I say?

Mr. Scotti: The defendant.

The Court: Obviously I meant the witness. Very well, we will advance our luncheon recess."

The circumstances under which the words were uttered show that they were not wilful, but made in good faith

in the belief they were true and while under a severe emotional strain. This is verified by the fact that during the recess appellant obtained medical assistance at a hospital, testified that day and at the subsequent trial date without incident (R. 61). The appellee had accused the appellant of malingering without proof or verification (R. 58), but did nothing then or at any time about establishing that fact.

From the foregoing, the only conclusion permissible is that the appellant in good faith sought to testify fully, but through the badgering of the district attorney and the provocations of the appellee, the incident occurred with which the appellant was charged. A finding that the appellant violated the vague statute cannot comport with due process. *Thompson v. Louisville, supra*; also *People v. De Feo*, 308 N. Y. 595, which holds that contempt is a wilful wrong.

It is ironical that when another witness, Robert Moses, testified, the appellee hardly reacted to his attitude as a witness, although his attitude was not in a class different from appellants (R. 131, 135, 139, 140).

CONCLUSION

The judgments below should be reversed.

Because of the hybrid remedy selected by appellee, it is necessary that the threads of the argument be gathered together in these closing words.

If the remedy pursued by the appellee be deemed simply a summary one, in that appellee had a right to punish appellant without a hearing and immediately after the outburst, then appellant should then have been afforded an opportunity to explain his emotional outburst. The

record reveals the emotional strain under which appellant was suffering and the medical attention required. Since appellee chose to postpone the hearing until after the trial he should have afforded appellant a plenary hearing in which to make explanation of his good faith and his emotional strain. And out of the respect for the principles enunciated in the *Offutt* case, such a proceeding should have been held before another judge.

In any event, the call for reconsideration of the procedures in summary contempt sounded by Justice Black should be heard now. This case makes such a call appealing. It will direct the future administration of justice in such cases. Present practice in contempt proceedings is in woeful confusion, with token recognition being given, as did the Court of Appeals in this case, to the need for caution against violating due process.

If this proceeding be deemed non-summary, then of course, all the requirements of due process in a plenary suit should have applied. The appellant was entitled to an effective right to be represented by counsel, to meet the charges and to produce witnesses. In summary, he was entitled to due process, but it was denied to him.

Respectfully submitted,

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November 25, 1963.

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SUPREME COURT

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IN THE
Supreme Court of the United States
October Term, 1963

No. 167

SIDNEY J. UNGAR,

Appellant,

against

HONORABLE JOSEPH A. SARAFITE, Judge of the
Court of General Sessions of the County of New York,

Appellee.

**BRIEF FOR NEW YORK CIVIL LIBERTIES UNION
AS AMICUS CURIAE**

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IN THE
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General Sessions of the County of New York,

Appellee.

**BRIEF FOR NEW YORK CIVIL LIBERTIES UNION
AS AMICUS CURIAE**

The New York Civil Liberties Union is filing this brief with the consent of the parties because it believes that this case is another instance of procedures in contempt cases which violate the constitutional guarantee of due process."

This Court in *Helvering v. Clifford*, 309 U. S. 331, at 337, used the concept of a "bundle of rights" to determine the legal consequence of a variety of powers, the existence of no one of which alone might lead to the same conclusion. So here, we submit, there is a "bundle of wrongs" which should lead to a determination that due process has been denied, even though that result might not follow from the existence of any one of the matters separately considered.

Here we have the situation of a witness testifying at length for the second time who has been made to feel that he is not trusted either by the parties or the judge. A point comes when he feels he can go no further. He respectfully asks for a brief recess. The outburst for which he has been

held in contempt came when this request was three times denied. Afterwards a further request by the witness for a recess so that he might "contain" himself resulted in the judge's comment that "this is as near malingering [as] could ever be determined from my observation." The lunch recess followed and the witness, having obtained medical assistance, resumed his testimony without further incident. Ten days later the trial ended. Two days after that, on a Thursday, the judge had an order to show cause served in the late afternoon returnable before himself the following Tuesday. Then the witness appeared with an attorney who requested an adjournment to prepare and because he was engaged elsewhere. This was denied and the witness had to proceed without the assistance of counsel. The judge forthwith adjudged the witness in contempt. And this judicial conduct was held by New York's highest court not to have violated the witness' right to due process under the Fourteenth Amendment!

That this series of events should have occurred in a civilized state in this 20th Century is hard to credit. Had it occurred in the federal courts it would most certainly have met the condemnation of this Court under the principles laid down in *Offutt v. United States*, 348 U. S. 11, recently applied in *Panico v. United States*, No. 45 of this Term, decided October 21, 1963. That substantially the same principles should govern state contempt cases is indicated by *In re Murchison*, 349 U. S. 133.

We submit, therefore, that the contempt conviction should be set aside.

Respectfully submitted,

NEW YORK CIVIL LIBERTIES UNION,
Amicus Curiae.

OSMOND K. FRANKEL,
of Counsel.

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IN THE
Supreme Court of the United States

October Term, 1963

No. 167

SIDNEY J. UNGAR,

Appellant,

against

HONORABLE JOSEPH A. SARAFITE, Judge of the
Court of General Sessions of the County of New York,

Appellee.

BRIEF FOR THE APPELLEE

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IN THE
Supreme Court of the United States

October Term, 1963

No. 167

SIDNEY J. UNGAR,

Appellant,

against

HONORABLE JOSEPH A. SARAFITE, Judge of the
Court of General Sessions of the County of New York,

Appellee

BRIEF FOR THE APPELLEE

Statement

The appellant, an attorney, was adjudged in criminal contempt by the appellee, then a judge of the Court of General Sessions of New York County. The contempt was committed by the appellant when, appearing as a prosecution witness in the trial of Hulan E. Jack, he shouted, in the presence and hearing of the court and jury "in a loud, angry, disorderly, contemptuous, and insolent tone, directly tending to interrupt the proceedings of the court and to impair the respect due to the authority of the court:

"I am absolutely unfit to testify because of your Honor's attitude and conduct towards me. I am being coerced and intimidated and badgered. The court is suppressing the evidence." (Order to Show Cause, R 90-91).

In the early part of 1960, Hulan E. Jack, then Borough President of Manhattan, was charged in a four count indictment with conspiracy and violation of conflict of interest provisions of the New York City Charter. Sidney J. Ungar, the appellant, was named a co-conspirator. In substance the indictment accused Jack of conspiring with Ungar and others to obstruct justice by concealing Ungar's payments to a contractor for renovation of Jack's residence, and of accepting gifts from Ungar, who was interested in matters involving payments from the City Treasury and whose business activities were subject to Jack's official actions. Two trials ensued, the first resulting in jury disagreement and the second in the conviction of Jack.

Ungar, who had been granted immunity in the grand jury, was called as a witness by the People at both trials. A long-time friend of the defendant (R 12-13), he was uncooperative, unresponsive and disrespectful, evading proper questions, volunteering irrelevant matter, asserting that he had no knowledge or recollection of pertinent facts which were clearly known to him, and cavilling about the form of certain questions. (Numerous instances of such conduct are set forth in the Order to Show Cause, R 70-91). This conduct necessitated repeated interruptions of the trial, constant rereading of questions and frequent admonitions by the court to the witness. After reiterated warn-

ings in open court and at the bench, the judge recessed the trial, retired to the robing room, and, out of the presence of the jury, again admonished the witness:

"The Court: Now, Mr. Witness, this case was tried once before and took considerable time. You were a witness for many days. A number of incidents occurred in that trial which, in my judgment, directly tended to interrupt the proceedings of the Court, and you were the one who created those incidents, in my judgment.

"I told you then, at the first trial, that you were creating a very serious problem for the Court and that, as a lawyer, I assumed you knew what the problem was.

"I should like very much to avoid any repetition of what happened the last time.

"We each have a function to perform here. Whether it is an agreeable function or a disagreeable function is of no concern.

"Now I have said to you up to now on a number of occasions that you should confine your answers to the questions, not to volunteer, not to get into any dispute or discussions, not to try to indicate what you think the question should be or how you should answer it.

"This is a trial before the jury, not before the Court alone. As a judge, I must rule in accordance with my understanding of the law, which I am doing.

"I hope you understand what I am saying, Mr. Ungar. Do you?

• • •

"The Witness: I have got to understand the question, in order to answer it. I can't answer a question

merely if your Honor says, 'Answer it,' if it doesn't make sense to me or if it's creating a false impression—

"The Court: Will you desist. You see, it's none of your business whether it creates in your judgment a false impression or not. The defendant is represented here by a lawyer, and the People are represented by a lawyer. It is for them to conduct this litigation, and not you.

"Now I am only going to make one more statement and we will return to the courtroom.

"There is a rule of law that every man is presumed to intend the natural consequences of his act. I am going to hold you to that standard." (R 84-85)

Nevertheless, Ungar maintained his previous course of conduct. Asked what Jack had said to him when he had told Jack that there was a full-scale investigation before the grand jury, Ungar replied, "that's only a small part of what I told him" (R 54). When the court insisted on a responsive answer, Ungar requested a recess, claiming that he was being "pressured and coerced and intimidated into testifying" and that he was being "badgered by the court and by the District Attorney" (R 55). When the court granted a recess of several minutes, but refused Ungar permission to leave the witness stand, he stated that he was "a bundle of nerves", that he "must have a recess", and that he could not testify (R 56). The court replied that he was not testifying, that no one was questioning him, and that the recess would continue for a few minutes longer (R 56). This, however, did not permit Ungar to avoid answering the unpleasant question that was pending and when, after a further interval of silence, the court directed the district attorney to proceed, Ungar shouted:

"I am not going to answer questions, your Honor. I am not going to testify in this confusion, and the Court nor anyone else will make me testify in this emotional state. I am absolutely unfit to testify because of your Honor's attitude and conduct towards me. I am being coerced and intimidated and badgered. The Court is suppressing the evidence" (R 56-57).

The court immediately informed the appellant that he was "not only contemptuous but disorderly and insolent" (R 57). After a luncheon recess, Ungar resumed his testimony (R 61-62). When the appellant was excused he was directed by the court to keep himself available for future action concerning his contemptuous conduct:

"The Court: Now Mr. Witness, with regard to your conduct as a witness in this case, the Court is deferring action until the completion of this trial. Please hold yourself available at that time."

However, the court wisely refrained from holding the witness in contempt at that time, lest such action in the midst of the trial prejudice the case against the defendant. Two days after the termination of the trial, the court had an order to show cause served on the appellant, answerable in five days.

Thus, having deferred action till the termination of the trial, and having further given the appellant five days written notice of the charges against him, the court substantially augmented his opportunity to prepare and present a defense beyond the ordinary rights accruing when a contempt is committed in the immediate view and presence of the court, as here.

At the outset of the hearing, an adjournment was requested on the ground that counsel whom appellant had retained was engaged in another matter (R 94). The court granted a recess of several hours to permit counsel himself to argue for the adjournment (R 95-96). However, when counsel appeared, he informed the court that at the time he was retained by the appellant he was already engaged in the other matter and that he had told the appellant that he could not represent him unless he obtained an adjournment (R 97). The court declined to grant an adjournment, stating that the appellant, knowing his conduct had been considered contemptuous and having been informed of the imminency of the contempt proceeding, should not have retained an attorney who was not free to represent him (R 99-100). After introducing certain documentary evidence himself, the court gave the appellant an opportunity to show cause why he should not be held in contempt (R 100-101). Declaring that he did not wish anything he said to be taken as participation by him in the hearing on the merits (R. 101), the appellant made a statement addressed to the court's authority to hold him in contempt in a summary proceeding and to its denial of an adjournment (R 101-105). It was only after he had been adjudged in contempt that he belatedly requested an adjournment to produce evidence (R 110-111).

Summary of Argument

1. The appellant's loud invective, hurled in the face of a sitting court, constituted a wilfully contemptuous denigration of the dignity of the court; and the finding of fact to such effect is not reviewable by this Court.

2. The vitally necessary, if extraordinary, power of a sitting court to punish immediately and summarily a contempt committed in its very view and presence, has been repeatedly held and considered to comport with constitutional requirements of due process. The reasoning behind this uniform rule is unimpeachable.

3. The power of summary adjudication, reasonably deferred, is not lost; nor does its exercise after the event trammel constitutional prerogatives. Exigencies of a trial situation may indeed, as here, counsel cautious postponement to protect the paramount right of the defendant to a fair trial. The acquisition by the contemnor of benefits attendant upon deferred adjudication does not entitle him to greater rights.

4. The exercise of the power of summary adjudication, instantaneous or deferred, rests upon the court's personal knowledge of the event. Judicial detachment must be presumed, unless the contrary is evident, and the contemnor is constitutionally entitled neither to another judge or cross-examination of witnesses. Apart from the absence of constitutional barrier to the multiple roles of a judge in a summary contempt proceeding, judicial prejudice was no factor in the present case since the affront was undisputed and unjustified, and was contumacious on its face.

5. The procedure here chosen accords with the holding in *Sacher v. United States*, 343 U. S. 1 (1952), which is still controlling authority.

6. The appellant having failed to avail himself of adequate opportunity to obtain available counsel—a right which was not due him—the court did not violate the contemnor's constitutional protection by denying further adjournment of the proceedings. The appellant was accorded a real opportunity to explain or justify his conduct, and enjoyed due process of law.

7. The appellant's claim that the New York delineation of contempt is void for vagueness, voiced for the first time to this Court, should not be heard. However, the standard is explicit and definite.

POINT I

The fully warranted finding of contempt is not here subject to review.

The appellant was held in contempt by the judge who witnessed his contemptuous conduct. The judge introduced evidence (R 100-101), stated his reasons for holding appellant in contempt (R 105-108), and set forth the circumstances of the offense in a mandate of commitment (R 38-40). The conviction was affirmed by the Appellate Division of the New York Supreme Court and by the New York Court of Appeals. A factual finding by state courts is not reviewable by this Court unless there is a complete lack of evidence to support it. *Thompson v. Louisville*, 362

U. S. 199 (1960). In the instant case the holding was amply supported by the evidence.

Throughout his testimony at the trial of Hulan Jack, the appellant was a reluctant, sometimes openly hostile, and frequently evasive witness. His increasingly disrespectful conduct towards the court culminated in his shouting at the court, in a loud, disorderly and contemptuous tone, "I am being coerced and intimidated and badgered. The court is suppressing the evidence" (R 56-57). That an unwarranted attack of this nature on the integrity of the court is contemptuous *per se* cannot be seriously disputed.

Cf. Fisher v. Pace, 336 U. S. 155 (1949);

Waldman v. Churchill, 262 N. Y. 247 (1938);

MacInnes v. United States, 191 F. 2d 157 (9th Cir. 1951);

Hyman Goldman Plumbing and Heating Corp. v. Nesbitt, 244 App. Div. 311 (1st Dept. 1935).

Indeed, so serious was the accusation hurled at the court that it might be deemed slander, since the suppression of evidence constitutes a crime under New York law (New York Penal Law, §814). In fact, in his brief to the New York Court of Appeals, the appellant conceded that his words, if spoken wilfully and deliberately, constituted a *prima facie* contempt. The intentional character of his conduct is demonstrated by the numerous other instances of testimonial recalcitrance in the face of repeated admonitions by the court. For, as noted, and set forth in the mandate, this was not an isolated instance of contumacious behavior but the climax of a continuous course of conduct by which the appellant deliberately intended to

defy the dignity and authority of the court to avoid giving testimony harmful to his friend.

Moreover, as stated by this Court in *Fisher v. Pace*, 336 U. S. 155, 160 (1949):

"In a case of this type the transcript of the record cannot convey to us the complete picture of the courtroom scene. It does not depict such elements of misbehavior as expression, manner of speaking, bearing, and attitude of the petitioner. Reliance must be placed upon the fairness and objectivity of the presiding judge."

In the instant case, the judge noted in the mandate of commitment that the utterance for which the appellant was cited was voiced in a boisterous and aggressive tone, and "with studied insolence" (R 39).

Thus the appellant's contention before this Court that the facts fail to substantiate his conviction is neither weighable nor weighty.

POINT II

The New York law under which appellant was held in contempt of court accords with the requirements of due process.

Introduction

Under New York law, contempt committed during the court's sitting, in its immediate view and presence, is punishable summarily. As under federal law, the judge presiding may punish the contempt immediately, without holding a hearing, based on his own knowledge of the fact, without

affording counsel to the accused, and without giving the contemnor an opportunity to cross-examine witnesses. Under the procedure sanctioned by the instant decision, the court may also defer the adjudication until the termination of the trial or a reasonable time thereafter, where an immediate adjudication might adversely affect the case on trial and the contemnor would not be harmed by the postponement. In this alternative procedure, the contemnor is nevertheless informed at once that his conduct is considered contemptuous and that the court intends to take action against him. As soon as they can be drawn, written charges are served on the accused, who is given five days notice of the proceedings and an opportunity to present a defense. In contrast to the federal law, which leaves the punishment to the discretion of the court, the maximum penalty that may be imposed in a summary contempt adjudication in New York—which is not even deemed a criminal trial—is 30 days imprisonment and a fine.

The appellant challenges on constitutional grounds the power of the state of New York to permit its courts to exercise the traditional enforcement of order and respect by such a deferred summary contempt procedure.

A. The power to punish summarily for contempt committed in the presence of the court does not violate due process.

Contempt committed in the presence of the court is punishable summarily under the laws of New York (Judiciary Law of New York, Section 751), under federal law (Rule 42 (a) Fed. R. Crim. Proc.), and under the laws of most jurisdictions. The necessity for the exercise of such summary

power has long been recognized and its use was very early sanctioned by this Court. In *Ex parte Terry*, 128 U. S. 289, 313 (1888), the Court stated:

"We have seen that it is settled doctrine in the jurisprudence both of England and of this country, never supposed to be in conflict with the liberty of the citizen, that for direct contempts committed in the face of the court, at least one of superior jurisdiction, the offender may, in its discretion, be instantly apprehended and immediately imprisoned, without trial or issue, and without other proof than its actual knowledge of what occurred; and that according to an unbroken chain of authorities, reaching back to the earliest times, such power, although arbitrary in its nature and liable to abuse, is absolutely essential to the protection of the courts in the discharge of their functions. Without it judicial tribunals would be at the mercy of the disorderly and violent, who respect neither the laws enacted for the vindication of public and private rights, nor the officers charged with the duty of administering them."

The constitutionality of summary contempt adjudication is implicit in the numerous decisions of this Court affirming such convictions or reversing them on other grounds. The contention that it is violative of due process was expressly rejected in *Fisher v. Pace*, 336 U. S. 155, 159-160 (1949), where the Court stated:

"This attribute of courts is essential to preserve their authority and to prevent the administration of justice from falling into disrepute. Such summary conviction and punishment accords due process of law."

Mr. Justice Jackson, in *Sacher v. United States*, 343 U. S. 1, 8 (1952), endorsed summary procedures with the cogent observation that:

"* * * the very practical reasons which have led every system of law to vest a contempt power in one who presides over judicial proceedings also are the reasons which account for its being made summary."

And, in a concurring opinion in *Green v. United States*, 365 U. S. 165 (1958), Justice Frankfurter stated: "* * * The most authoritative student of the history of contempt of court has impressively shown that 'from the reign of Edward I, it was established that the Court had the power to punish summarily contempt committed in the actual view of the Court' " (365 U. S. 165, 189). He pointed out that, in at least two cases in the Supreme Court "not to mention the vast mass of decisions in the lower federal courts, the power to punish summarily has been accepted without question" and listed fifty-three Justices of the Court as having sustained its exercise (365 U. S. 165, 190-2).

The appellant's historical discussion of dark origins of the power of summary contempt, and his exposition on the colonial antipathy to British traditions, have little bearing on the constitutional question. The issue is more properly judged by the present day necessity to enforce respect for courts and preserve their proper functioning. Today, ours is a society of growing complexity, subject to the clash of increasingly urgent needs. The courts stand at the navel of community conflict. The just resolution of civil strife by the orderly process of law was never more vital to national health than it is today. And without respect, there can be no administration of law; indeed, it is probably the only alternative to force. By the very nature of its work, the trial court is the meeting place of hostile, opposed, and often intense emotions. For the most part,

these stresses do not disrupt the quiet dignity of the forum. But it is clear that the judge must have at hand effective emergency measures to assure the continuing operation of the tribunal. Responsible and restrained use of such power, subject to dispassionate review, can not be said to offend the basic tenets of ordered liberty which are, rather, preserved thereby.

B. The Fourteenth Amendment does not compel instantaneous exercise of the summary contempt power.

It is not disputed, and indeed could not be, that the conduct for which the appellant was cited occurred in the immediate view and presence not only of the court, but the jury, the public, and the press represented in the courtroom. It is equally manifest that the shouted vituperation, climaxing a persistent pattern of disobedience, constituted behavior disrupting and directly discrediting the actual conduct of a judicial proceeding. Consequently the court clearly had the power to punish the appellant instantly and summarily. The appellant, *pro se*, admitted as much during the action against him (R 101). The peculiar feature of the present case is the court's reservation of the exercise of its acknowledged power to a future time. It is claimed that, somehow, the power evaporated during the short delay in its application. So, the appellant argues, necessary and firmly established judicial power is irrevocably lost simply by the passage of time. This despite the fact that the deferment of action was required to insure the fairness of the trial in progress and, far from suffering harm by reason of the postponement, the contemnor gained benefits not normally due him. The trial court, in explaining the reason for the procedure adopted, stated:

"It was only out of a deep consideration for the rights of a defendant that this man was not adjudged and punished for contempt on November 25, 1960. When in the presence and view of the Court he committed the acts set forth in the order to show cause.

"I did not want to take any action during the trial, at any time, which would in the slightest degree even tend to diminish the rights of a defendant to a fair trial.

"I feared that if I took action against this witness, it would be possible that the action would unduly influence a juror. So action was deferred until the completion of that trial" (R 98-99).

The posture of the trial at the time of the appellant's contumacious outburst was such that immediate punitive action by the court, although warranted, would have been unwise. An adjudication of contempt on the spot might indeed have adversely affected the defendant's rights. Ungar, a named co-conspirator of Jack's, had professed close friendship with the defendant on trial. The trial was a highly sensitive one owing to the high office of the defendant. Under these circumstances, had the jury learned of judicial action against Ungar, it might have been interpreted as hostility toward the defendant's cause. Even if held in the jury's absence, there would have been real danger, in this highly publicized trial, that a juror would have heard of it indirectly. But more important, such action by the court might have transformed the bias of the witness from favoring the defendant to favoring the prosecutor. His future testimony, delivered under a jail sentence imposed or impending, might well have reflected an effort to cull favor by damaging the target of the prose-

cution beyond deserts. And this witness, Ungar, was in a position to severely damage the defendant if he chose to. Moreover, a similar bias might have been introduced in future witnesses who may have feared that testimony hostile to the prosecution might subject them too to judicial displeasure. Thus, the wisdom of the court's election of minimal measures at the critical moment in the trial in order to enforce proper conduct, while reserving exercise of full sanctions to obviate risk to the defendant, is apparent.

The second important aspect of the chosen procedure is the enhanced opportunity accorded to the appellant to prepare an explanation or justification for his courtroom behavior which might have excused or mitigated the offense. He was informed immediately that the court deemed his conduct, prima facie, insolent and contemptuous. He was warned at the conclusion of his testimony three days later, to remain available for action relating to his performance as a witness until the conclusion of the trial. Ten days later written charges were served in an order to show cause requiring his presence five days thereafter. By virtue of the deferred procedure, therefore, the appellant gained seventeen days to reflect, obtain medical records or witnesses, and seek the counsel of an attorney. In addition, he faced the court on carefully written and detailed allegations, not only of the specific contemptuous outburst but of the basis for the court's belief that his attitude was contumacious when the impeachment of the court was uttered. He had in hand not only the charge but the fullest "bill of particulars" with five days allowed for study and preparation of a defense. None of this was required; all inured to his real benefit.

Yet the appellant argues that the very bestowal of undeserved benefits diminished the power of the court. The crucial moment of obloquy hurled in the face of the court having passed, he contends, the Fourteenth Amendment required total abandonment of summary procedures. For such procedure, he claims, deprived him of an adjudication by an impartial tribunal and of the right to cross-examine.

In so arguing, he distorts the essence of the power of summary adjudication. Such power does not rest on temporal considerations. Rather, the unusual power derives from the unusual feature of having occurred in the presence and view of a sitting court. It is inherent in the nature of such contempt that the court offended witnessed the offense. The court has the power to punish without the ordinary plenary procedures for the finding of fact because such findings simply need not be made where the fact-finder has personal knowledge of the occurrence [*Douglas v. Adel*, 269 N. Y. 144, 146-7 (1935)]. An opportunity to explain must be accorded [*In re Rotwein*, 291 N. Y. 116 (1943)], but no more. Viewed in this light, it is clear that the basis for summary power—knowledge of the fact—is not erased by the lapse of a short interval of time. And to defer the exercise of the power is not to destroy it.

In addition to the New York Court of Appeals, the highest court of Michigan, the highest court of Pennsylvania, the appellate courts of California, the Circuit Court of Appeals for the Second Circuit, and the Circuit Court of Appeals for the Eighth Circuit, have either held or expressed the view that the exercise of summary contempt power may be deferred.

- In re Henry*, 119 N. W. 2d 671 (Mich. 1963);
Appeal of Levine, 95 A. 2d 222 (Pa. 1953);
Ex parte Grossman, 293 P. 368 (Cal. App. 1930);
United States v. Panico, 308 F. 2d 125 (2d Cir. 1962);
United States v. Galante, 298 F. 2d 72 (2d Cir. 1962);
United States v. Sacher, 182 F. 2d 416 (2d Cir. 1950);
Nilva v. United States, 228 F. 2d 134, 135 (8th Cir. 1955); *aff'd* 352 U. S. 385 (1956).

With respect to the claim that a different judge should have been called upon to adjudicate the issue, it may be acknowledged that such a procedure might be advisable, as indicated by the Court of Appeals in affirming the present case. But it is not required by due process. Even the federal rules only require the attention of a different judge where the alleged contempt occurred out of the view and presence of the court offended. Absent a showing of an embroilment with a judge so personal in nature as to destroy judicial impartiality [*e.g.*, *Offutt v. United States*, 348 U. S. 11 (1954)], it cannot be assumed that a sitting judge, insulted by a witness, is incapable of detached judgment. In the present case, the court went to some lengths to state that he felt no personal animosity but was bound to vindicate the dignity of the court in which he presided (R 106). And there is no reason to doubt the sincerity of his statement. The contempt involved no heated wrangling or intemperate personal exchanges, but a single shouted defiance. The role of a judge, contrary to the appellant's contention (brief, pp. 27-8), necessarily imports dispassion. An insult to the court, therefore, can not be considered the personal

affront which invites retaliation. And the judge witnessing the contempt to his court can not be deemed disqualified to deal with it. It is a normal attribute of contempt in the view of a sitting court that the judge proffers charges, is himself the prime witness, fact-finder, and pronounces sentence. Nor can he be said to be constitutionally disqualified in any of these roles.

In re Murchison, 349 U. S. 133 (1955) and *In re Oliver*, 333 U. S. 257, cited by the appellant for the proposition that it is a denial of due process for the contemnor to be held in contempt by the same judge who witnessed his misconduct, involved not contempt of court, but contempt before a grand jury. Although the Court held in *In re Murchison* that the judge who constituted the one-man grand jury could not preside at the contempt hearing, it specifically noted that this did not involve "the long exercised power of courts summarily to punish certain conduct occurring in open court," 349 U. S. 133, 134.

Beyond these considerations, on the present record, possible prejudice on the part of the court was not a factor. There was no issue on the fact. The utterance was made, it was the culmination of a stubborn course of defiantly uncooperative behavior, no excuse or explanation was offered, and the appellant's utterance was clearly contemptuous. Thus, there was absolutely no necessity to present the evidence to another judge since the result would, of necessity, have been identical.

This reasoning on the nature of contempt punishable summarily, and the derivation of the court's power to sit in multiple roles, is fully supported by the decision of this

Court in *Sacher v. United States*, 343 U. S. 1 (1952). There, in a situation similar in vital respects, Mr. Justice Jackson, writing for the majority, stated:

"The rule in question contemplates that occasions may arise when the trial judge must immediately arrest any conduct of such nature that its continuance would break up a trial, so it gives him power to do so summarily. But the petitioners here contend that the Rule not only permits but requires its instant exercise, so that once the emergency has been survived punishment may no longer be summary but can only be administered by the alternative method allowed by Rule 42 (b). We think 'summary' as used in this Rule does not refer to the timing of the action with reference to the offense but, refers to a procedure which dispenses with the formality, delay and digression that would result from the issuance of process, service of complaint and answer, holding hearings, taking evidence, listening to arguments, awaiting briefs, submission of findings and all that goes with a conventional court trial. The purpose of that procedure is to inform the court of events not within its own knowledge. The Rule allows summary procedure only as to offenses within the knowledge of the judge because they occurred in his presence.

"Reasons for permitting straightway exercise of summary power are not reasons for compelling or encouraging its immediate exercise. Forthwith judgment is not required by the text of the Rule. Still less is such construction appropriate as a safeguard against abuse of power. If the conduct of these lawyers warranted immediate summary punishment on dozens of occasions, no possible prejudice to them can result from delaying it until the end of the trial if the circumstances permit such delay. The overriding considera-

tion is the integrity and efficiency of the trial process, and if the judge deems immediate action inexpedient he should be allowed discretion to follow the procedure taken on this case. . . .

" . . . If we were to hold that summary punishment can be imposed only instantly upon the event, it would be an incentive to pronounce, while smarting under the irritation of the contemptuous act, what should be a well-considered judgment. We think it less likely that unfair condemnation of counsel will occur if the more deliberate course be permitted.

"We hold that Rule 42 allows the trial judge, upon the occurrence in his presence of a contempt, immediately and summarily to punish it, if, in his position delay will prejudice the trial. We hold, on the other hand, that if he believes the exigencies of the trial require that he defer judgment until its completion he may do so without extinguishing his power." (343 U. S. 1, 8-9).

Since the Court neither held the federal courts' exercise of summary contempt power at the termination of the trial unconstitutional, nor even prohibited it under its supervisory authority over federal courts, but on the contrary, recognized that the exigencies of the trial may require it, similar action by State courts cannot be deemed to violate the Fourteenth Amendment.

The appellant would distinguish *Sacher* on the ground that there the adjudication of contempt was made immediately upon the conclusion of the trial, whereas here, it was made several days after its completion. This is the classic distinction without a difference. If the exercise of the power could be deferred to the conclusion of the trial it could be deferred a few days beyond, particularly for

the purpose of furnishing written specifications. Certainly, the added interval is of absolutely no constitutional significance.

The appellant also contends that *Sacher* was overruled by *Offut v. United States*, 348 U. S. 11 (1954), and by *Panico v. United States*, — U. S. —, 84 S. Ct. 19 (1963). Neither the reasoning nor the language of *Offut* or *Panico* lends support to this claim. Justice Frankfurter, writing for the majority in *Offut*, expressly disavowed such an intention when he began his discussion of the applicable law with the statement, "We shall not retrace the ground so recently covered in the *Sacher* case * * *" 348 U. S. 11, 13. The decision in *Offut* is based on a special finding that there was a "continuous wrangle" between the court and counsel and that the trial court's adjudication of contempt was infused with personal animosity. Indeed, the trial judge's personal antagonism toward counsel was such that the Court of Appeals reduced the sentence imposed on counsel on the ground that the contempt was provoked by the judge. In the instant case the trial court's action was not motivated by counter-aggression. Indeed, the judge indicated that he did not consider the appellant's contemptuous conduct as a personal affront but as an obstruction to the due administration of justice (R 106), and the New York Court of Appeals held "that appellant's contemptuous remarks were not a personal attack upon the trial judge" (R 166). Moreover, this Court specifically stated in *Offut* that its decision was based on its "supervisory authority over the administration of criminal justice in the federal courts" 348 U. S. 11, 13, and not on constitutional grounds.

Furthermore, *In re Murchison*, 349 U. S. 133, 134 (1955), decided after *Offut*, cited the *Sacher* decision, firmly indicating its survival as viable authority.

In *Panico v. United States*, *supra*, the defendant was adjudged guilty of criminal contempt in a summary proceeding and sentenced to fifteen months imprisonment. He contended that at the time of the conduct for which he was held in contempt he was suffering from mental illness. Shortly after his conviction he was found to be schizophrenic by a court-appointed psychiatrist. This Court reversed on the ground that he was entitled to a hearing on his claim of insanity. Since that involved a question of fact not within the court's knowledge, a summary adjudication of contempt would have been equally improper had it been made immediately upon the occurrence of the contemptuous conduct. Consequently, this holding could have had no impact on *Sacher*, for the Court nowhere intimated that deferring the summary adjudication of contempt till the end of the trial was improper. In the instant case the court gave the defendant an opportunity to show why he should not be held in contempt (R 101), but he declined to do so (R 101). It was only after he was convicted that he requested time to present medical evidence that he was under emotional stress at the time of the occurrence (R 110).

C. The appellant was not denied due process by the court's refusal to grant an adjournment on the ground that counsel was otherwise engaged.

This Court is bound by the determination of the New York Court of Appeals that the nature of the adjudication was summary, though not instantaneous (R 3-4, 154-156).

In such abbreviated procedure—which cannot be properly considered a criminal trial—an accused enjoys no right to counsel, and the opportunity for preparation is limited [*Nilva v. United States*, 382 U. S. 385 (1957); *People v. Cirillo*, 11 N. Y. 2d 51 (1962)]. While the appellant here was given considerable advance notice, with the concomitant opportunity to consult or retain counsel, he did not acquire thereby rights inappropriate to the nature of the proceeding. The court was not bound to remedy his failure to avail himself of the ample opportunity granted. Although warned on November 25th and again on November 28th and served with papers on Thursday, December 8th, the appellant did not consult an attorney until Saturday, December 10th. And then, of all the attorneys in New York, the one he chose to represent him was one he knew would be engaged on the return date (R 97).

There being no right to counsel, the court was not bound to allow an adjournment for the convenience of the appellant's lawyer, nor for the appellant to select another. The disposition of a request for an adjournment to obtain counsel or to give counsel time to prepare lies within the sound discretion of the court. *Avery v. Alabama*, 308 U. S. 444 (1940); *Torres v. United States*, 270 F. 2d 252 (9th Cir. 1959); *United States v. Arlen*, 252 F. 2d 491 (2d Cir. 1958); *People v. Jackson*, 111 N. Y. 362 (1888). Compare *Nilva v. United States*, 352 U. S. 385, p. 395, Note 10 in accompanying text (1956). That discretion was not abused here.

In addition, it must be remembered that the appellant was an experienced attorney, and the proceeding merely called for an explanation of his own conduct, a subject no

one was better qualified to deal with than he himself. Yet, when the court called upon the appellant to show cause why he should not be punished for contempt, he replied that he did not wish to participate in the proceedings (R 101, 105). Nevertheless he spoke at some length (R 101-105), and it was certainly not for lack of opportunity that he failed to present an excuse for his vilification of the robe.

POINT III

The validity of Section 750 of the New York Judiciary Law, not having been raised in the state courts, is not properly before this Court.

Here, for the first time, the appellant challenges Section 750 of the New York Judiciary Law as vague. This contention was neither presented to nor passed on by the New York courts, where the appellant's only constitutional point was the alleged deprivation of procedural due process. The specific arguments, as set forth by the Court of Appeals in the amended remittitur (R 164), consisted of alleged abrogations of due process by:

- (1) the trial judge's refusal to grant an adjournment of the contempt proceeding upon proof of the engagement of his counsel; (2) the trial judge's invoking summary power under §751 of the Judiciary Law seven days after the end of the trial during which the contempt was committed, and (3) the same trial judge's presiding in the resulting contempt proceeding even though he was the judge "personally attacked."

Nowhere, prior to his Statement of Jurisdiction to this Court, has the appellant argued that Section 750 was void for vagueness. It is fundamental that a federal question

not raised in the state courts is not reviewable by this Court [*Dorrance v. Penn*, 287 U. S. 660 (1932); Rules 15(d), 16(b), Supreme Court Rules]. Thus appellant's present contention concerning Section 750 is not properly before the Court.

It is clear, however, that the Section does not lack specificity. To constitute contempt, the conduct must not only be disorderly, contemptuous or insolent, but it must also directly tend to interrupt the proceedings of the court or impair the respect due it. The measure is, if anything, more explicit than the comparable federal law which provides that a court may punish for contempt such conduct as "misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice." 18 U. S. C. §401. The statutes of most states contain equally comprehensive provisions, and at least nineteen states have statutes that are almost identical to Section 750 of the New York Judiciary Law:

- Ala. Code Re-compiled*, Title 13, §2 (1958);
- Ark. State Ann.*, Title 34, §901 (1947);
- Cal. Code of Civ. Proc.*, §1209;
- Conn. Gen. Stat.*, Title 51, §33 (1958);
- Idaho Code*, Title 7, §601 (1947);
- Iowa Code Ann.*, §665.2 (1946);
- Mich. Stat. Ann.*, §27A.1701 (1961);
- Minn. Stat. Ann.*, §589.01 (1945);
- Mo. Rev. Stat.*, §476.110 (1959);
- Rev. Code of Mont.*, §93-9801 (1947);
- Neb. Rev. Stat.*, Ch. 25, §2121 (1943);
- Nev. Rev. Stat.*, §22.010;
- No. Car. Gen. Stat.*, Ch. 5, §1 (1953);

No. Dak. Century Code Ann., §33-10-01 (1959);
Okla. Stat., Title 21, §565 (1961);
Ore. Rev. Stat., §33.010 (1961);
Utah Code Ann., Title 78, §32.3 (1955);
West's Wisc. Stat. Ann., §256.03 (1957);
Wyo. Stat., Title 1, §668 (1957).

The New York statute provides an ascertainable standard of guilt. It has been construed and applied in innumerable instances [see, *e.g.*, *Matter of Rotwein*, 291 N. Y. 116 (1943); *Matter of Douglas v. Adel*, 269 N. Y. 144 (1935); *Waldman v. Churchill*, 262 N. Y. 247 (1933)]. It would indeed tax the most exacting draftsman to formulate a more descriptive criterion of conduct which breaches good order and undermines the respect which must clothe the proceedings of our vital democratic institutions of justice.

Conclusion

The judgment of conviction should be affirmed.

Respectfully submitted,

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Supreme Court of the United States
OCTOBER TERM—1963

No. 167

SIDNEY J. UNGAR,
against

Appellant,

HONORABLE JOSEPH A. SARAFITE, Judge of the
Court of General Sessions of the County of New York,
Appellee.

REPLY BRIEF FOR APPELLANT

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February 4, 1964.

Supreme Court of the United States

OCTOBER TERM—1963

No. 167

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General Sessions of the County of New York,

Appellee.

REPLY BRIEF FOR APPELLANT

The appellant submits the following short brief in reply to the points urged by the appellee.

(1)

The appellee argues that since the power to punish for contempt could have been exercised instantly at the trial, the postponement of the contempt proceedings until after the termination of the trial did not and should not alter the procedure. This is essentially the heart of the appellee's argument.

Assuming the power of the trial court to instantly punish a contempt committed in his presence, it is only necessity of circumstances, at best, which has produced the anomaly of allowing the same judge to be the complainant, prosecutor, law-maker and judge in his own case. But once the necessity is gone by the termination of the trial, as in this case, there is no reason why the

contempt hearing must take place before the same judge, especially when the judge is personally involved in the charges with the alleged contemnor.

The appellee complains that the appellant would diminish the power to punish merely because its exercise was delayed for the reasonable needs of the administration of justice at the criminal trial. But the appellee urges a power, which has no foundation in history or in the necessities of jurisprudence. Power does not exist in a vacuum. If the power to punish for contempt is summarily exercised by the same judge at a trial because of necessity, it does not then follow that such power is authorized when the necessity does not exist. It is not a question of diminishing the power in the latter circumstances. It is a recognition (though *arguendo*) that there is authority for the power in one instance, and its lack in the other.

There need be no misgivings about the distinction. The administration of justice will not suffer by the withholding of such power in a case like the instant one. All that will happen is that the hearing will take place before a judge other than the one who makes the charges. That requirement will not place any unusual demand on the machinery of the courts. And as appellant pointed out in Brief for the Appellant, even the New York Court of Appeals admonished against the practice, but did not provide the appellant a remedy to conform to its words.

Had the appellee filed a complaint against appellant in a criminal prosecution, charging the appellant with the acts he complained of as contemptuous, the case would have been tried before another tribunal, with all the protections of due process, and without any extraordinary burdens on either the complainant or the tribunal.

(2)

The appellee also argues that the words spoken by the appellant were found by the state courts to be contemptuous and therefore, there is nothing for this court to review. Assuming such a finding cannot be reviewed, there still remains for this court to pass upon the validity of the statutes on their face and as construed, whereby a judge is empowered to make his own law and sit in the same case in which he is the complainant and is embroiled with the accused.

But the appellee is incorrect in its assumption that this court may not review the finding of contempt. This court may review a finding when the constitutional right rests upon it. *Feiner v. New York*, 340 U. S. 315. *Thompson v. Louisville*, 363 U. S. 199. Here, there was a serious question whether the appellant wilfully uttered the words or whether they were produced through provocation and circumstances beyond appellant's control. There was no concession by the appellant in the Court of Appeals that his acts were contemptuous. Appellant there argued that it would be contempt if the words had been said "deliberately and wilfully" and "with an intent to defy the dignity and authority of the Court"; appellant then argued that no such facts or motives existed or were proved and therefore there was no contempt.

(3)

The validity of Section 750 was challenged by appellant in the contempt proceedings, although not stated explicitly. Appellant was not represented by counsel—as he had a right to be—nevertheless in a hostile environment he did his best to point out the uncertainty of the charges he had to meet. This court in *Tomkins v. Missouri*, 323 U. S.

485, 487 and *Pollard v. United States*, 352 U. S. 354, 359 recognized the sufficiency of the challenges, albeit implicit, under similar circumstances.

In any event Section 750 is so interwoven with Section 751 (see Mr. Justice Black in *Green v. United*, at page 198, "allows . . . a judge to lay down the law, to prosecute those who he believes have violated his command (as interpreted by him), to sit in 'judgment' on his own charges, and then within the broadest kind of bounds to punish as he sees fit"), that the two sections are really one inseparable law distinguished only by numbering.

(4)

This brief would have been concluded were it not for the erroneous statements of fact in appellee's brief. While those errors do not directly affect the issues of law before this court, nevertheless appellant, for the sake of a complete and accurate record must make the following observations:

1. Appellee in his brief (page 2) asserts that Hulan Jack was indicted and convicted for accepting gifts from Sidney J. Ungar whereby his official actions might be influenced. This charge was contained in Count Four of the indictment. But Jack was acquitted of said charge. He was convicted on a charge under Section 886 of the New York City Charter, which states that any municipal employee who accepts a loan or gift or thing of value directly or indirectly, from anyone interested directly or indirectly in the performance of a contract involving the payment of money from the City Treasury is guilty of a misdemeanor. It was never proved that Jack's official actions were involved or influenced. In fact, on appeal by Jack the statute was attacked as vague.

2. Appellee (page 2) refers to immunity granted to appellant, but omits to state that appellant withdrew such immunity before the Grand Jury but the offer was rejected by the District Attorney.

3. Appellee uncomplimentarily characterizes the appellant's behavior. But a reading of the Order to Show Cause (R. 70-91) and the record of the trial will show that appellant was not uncooperative, evasive, disrespectful or cavilling. There were scarcely any interruptions or warnings in open court during the several days appellant testified.

4. Appellee states (page 2) that Hulan Jack was a long-time friend of appellant. That was true. But it should not be overlooked that the Assistant District Attorney who was badgering and provoking appellant during his testimony was a long-time associate in the District Attorney's office and friend of the appellee.

5. The record of the events leading to the alleged contemptuous utterance is found on pages 54-56 of the record. They show that the questions the District Attorney asked were not unpleasant to appellant (as appellee states, page 4), but only unanswerable in the form asked, and that under the circumstances, the appellant's claim that he was being "pressured, coerced and intimidated into testifying" was accurate.

6. Appellee asserts (page 18) that appellee could have disposed of the contempt charges in an impartial manner, because he was not personally embroiled with appellant. Yet appellee asserts (page 9) that the accusation made by appellant was so serious that it was slanderous of the appellee. Slander, by definition is the giving of personal

offense. It therefore implies embroilment. It is hard to conceive of an impartial hearing by one so slandered.

7. Likewise, in the attempt to demonstrate that appellee could be impartial, inconsistencies appear throughout his argument. For example, on page 18 appellee states he could be impartial, because there were "no heated wrangling or intemperate personal exchanges, but a single shouted defiance." Yet his brief is replete with references (pp. 9, 14, 15, 16) to the disorderly character of appellant's behavior. If appellant was so free of disorderly behavior, why did the appellee go to great pains in enumerating lengthy specifications of them and why does appellee again dwell upon them? If appellant was without sin except for the single instance of shouted defiance, then the sole charge of contempt is that instance. And that charge is the personal embroilment with appellant that made them adversaries. It is an unseemly spectacle in jurisprudence for an adversary to sit in judgment on his accuser, no matter how earnest or sincere his professions of impartiality may be. Under our system of jurisprudence not only must there be a hope for impartiality, but there must be an appearance of it. An adversary cannot *prima facie* appear impartial.

8. Appellee asserts (p. 24) without any factual basis that appellant deliberately retained counsel who had an actual court engagement. The facts are clearly to the contrary. Appellant was served with papers of a complex nature that occupy 24 pages of the Transcript of Record (R. 67) in the late afternoon of a Thursday returnable on the following Tuesday. During that period he sought to retain available counsel, but without success. During the week-end a 17-inch snowstorm paralyzed work and traffic in New York.

Had appellant been charged with illegal parking of a motor vehicle he would have been accorded greater protections, even under normal conditions. Yet appellant laboring under the handicap of complexity, the unusual snowstorm and the interval of only one business day was expected to be ready for trial with counsel in a contempt proceeding in which his liberty and his reputation as a lawyer and person were at stake. This is unbelievable! It reveals the prejudice of the appellee against appellant, or at best, demonstrates a disregard of the constitutional right of the appellant to a fair hearing before an impartial tribunal.

Respectfully submitted,

EMANUEL REDFIELD,
Counsel for Appellant,
60 Wall Street,
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February 4, 1964.

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IN THE

Supreme Court of the United States

October Term, 1963

No. 167

SIDNEY J. UNGAR,

Petitioner,

~~—against—~~

HONORABLE JOSEPH A. SARAFITE, Judge of the Court of
General Sessions of the County of New York,

Respondent.

PETITIONER'S PETITION FOR RE-HEARING

Petitioner, an attorney-at-law in good standing in the
State of New York, does hereby submit, pro se, the accom-
panying Petition For a Re-Hearing.

Respectfully submitted,

SIDNEY J. UNGAR

Petitioner, pro se

Office & P.O. Address

350 Broadway

New York 13, N. Y.

IN THE
Supreme Court of the United States

October Term, 1963

SIDNEY J. UNGAR,

Petitioner,

—against—

HONORABLE JOSEPH A. SARAFITE, Judge of the Court of
General Sessions of the County of New York,

Respondent.

PETITIONER'S PETITION FOR RE-HEARING

Petitioner, on the following grounds, petitions this Court
for re-hearing:

It is a difficult and unhappy task to take issue with, and claim that major factual findings and statements contained in the Court's majority opinion are basically inaccurate, but since the Court's concept of petitioner's and respondent's conduct during the trial forms the gravamen, very heart and basis of its decision, petitioner must call the real facts thereof to the Court's attention in the hope that, placed in proper perspective, they may cause the Court to reconsider its opinion.

The record submitted to the Supreme Court contains but a fraction of appellant's testimony in the second trial. The only testimony in the transcript before the Court is that set forth in Exhibits 2, 3, 4 and 7 of the petition to the Appellate Division and the excerpts contained in the Judge's contempt citation. Counsel did not print the ba-

lance of the record, in the belief that it was not necessary or relevant for decision of the constitutional questions before the Court. His position was that only the incident of alleged contempt on November 25th was charged and before this Court for determination. On the issue of embroilment between the petitioner and respondent, counsel felt that said incident alone disqualified the respondent from sitting as the Judge in the contempt hearing.

Had appellant known that the Court would consider background to determine whether there was embroilment, hostility or bias, the full record would have been submitted.

It is respectfully contended that if such record were fully examined the Court would not take the position that petitioner "from the outset of the second trial * * * was a hostile witness engaged in much wrangling * * * unresponsive * * * failed to heed instructions * * * , continued the pattern after being warned in chambers * * * , and failed to give a responsive answer to a question of apparent significance to the State."

It is further respectfully submitted that a reading of the full testimony could not possibly lead to the factual conclusions drawn in the opinion that

(1) petitioner claimed he was being badgered and that the Court was "suppressing evidence" because he was being required to answer questions asked, rather than others which he would rather answer, and that

(2) "whatever disagreement there was between petitioner and the Judge stemmed from the petitioner's resistance to the authority of the Judge and its exercise during the trial."

The inference from these statements in the majority opinion is that petitioner was continually creating problems; whether intentionally or not, for the Judge, who was forbearing and patient, and the Judge was forced into the position of holding petitioner in contempt.

Although petitioner has been advised that the question of whether he was actually guilty of contempt was not before the Court; it is the key issue to petitioner. Furthermore, petitioner believes that it was an important element in this Court's consideration of the case and its opinion. Petitioner is not interested in narrow legal concepts. However, aside from the absent testimony of the first and second trials, there are a number of incontrovertible facts not before the Court that establish that these conclusions and inferences are inaccurate and that the Court is under a serious misapprehension and misconception of the facts.

1. The Civil Liberties Union, after a study of the full record, in its brief to the Court of Appeals, had the following to say about the respondent's conduct: "The record of the trial contains ample evidence of respondent's hostility to petitioner and of his personal embroilment with him. . . . Respondent . . . allowed his disagreeable experience with petitioner at the first trial to color his attitude toward petitioner at the new trial . . . It is evidence of the climate of hostility against petitioner *created by respondent* that respondent made a classical "Freudian" mistake in calling petitioner a "defendant" and that the prosecuting attorney arrogated to himself the prerogative of the judge to make rulings. . . ." The record in the instant case contains substantial evidence of the respondent's animosity to petitioner and his personal involvement . . ."

2. A convincing example of respondent's hostility, misconduct, bias, impatience and attitude toward petitioner is found in the action he took with respect to the motion made by the petitioner, before petitioner even became a witness at the second trial, which motion is set forth on pages 124-130 of the record of this Court.

Petitioner, acting as his own attorney, made a formal motion before the Court on notice to all parties, returnable on November 18, four days before he was called to testify, in which motion he asked the Court to be made a Court's witness, and be given protection against improper, unfair and irrelevant questioning by either the District Attorney or defendant's counsel to which he had been ruthlessly subjected in the first trial, and he further asked the Court for leave to give the court privately the full facts not developed in the first trial.

The Judge would not hear the motion on the return date, the 18th. The record shows that on the 22nd, the prosecutor called petitioner as a witness and the following occurred before petitioner was sworn:

The Judge called a conference at the bench of counsel and then stated:

"Please stand near, Mr. Ungar so that you can hear this."

.

"On November 17th, the witness did bring some papers here into Court and had them delivered to me. These papers are on legal cap and on the back it states 'Notice of Motion, affidavits and exhibits'

In my opinion, these papers do not constitute any proper motion and I do not so recognize them
In my judgment there is no merit whatsoever to these

papers of legal cap, and I am not treating them as a motion. However I am treating them as requests addressed to the Court in camera * * * and they are all denied.

"Ungar—May I ask a question, your Honor?

"The Court: No, you may not. So that there will be no possible misunderstanding of the Court's ruling when I said I shall deem these papers as a request addressed to the discretion of the Court in camera, I also meant to say in no uncertain terms that these papers shall not be a public record * * *."

Petitioner does not question the Judge's power to deny the motion. However, does this Court know of any legal procedure whereby a court can say that a duly made motion is not a motion; that it will not allow the moving party to say anything; that it will consider the application as a secret and that it will suppress its contents? Yet respondent did all of these incredible things. Are they not evidence not only of abuse of power, but hostility and bias?

3. Respondent's strange conduct may be more referable to hostility and bias when important background facts dealing with the relationship and interest of all the parties, some antedating even the first trial, are examined. A deep-rooted and ineradicable general prejudice of the Judge then appears.

(a) The record of the first trial shows colloquy between both counsel and the Judge seeking to lay the basis for a contempt finding against petitioner in said trial. Because of the wide publicity given to the case, there were political considerations that dictated punishment of petitioner as well.

(b) In the first trial petitioner's testimony covered almost 900 pages and took more than six days. This, without access to his ten days of Grand Jury testimony. The jury disagreement occurred despite defense counsel's peculiar strategy of *making petitioner appear to be the actual defendant on trial rather than establishing the facts of his own client's innocence*. Petitioner apparently had been able to testify to sufficient of the material facts to create a doubt in the minds of almost 50% of the jury and respondent blamed appellant for this jury disagreement.

(c) Before the second trial petitioner asked for permission to refresh his memory by an examination of his former testimony. This was denied him. The prosecutor however, called petitioner and offered to "prepare" him. Petitioner refused to make a deal to convict a man whom he believed to be innocent of any wrongdoing and notified the Court thereof. (Pg. 100)* This was the reason for and background of petitioner's motion above stated.

(d) The District Attorney again reassigned Respondent, his former colleague of 17 years in the prosecutor's office in N. Y. County to preside at the second trial, and petitioner believes this not only to be improper, but as definite indication of recognition of respondent's attitude. Both the defendant and petitioner were therefore in a "locked" courtroom. The District Attorney and respondent between them as the record shows, circumscribed petitioner's testimony in the second trial to less than half of the first trial. Every item of the alleged "wrangling" or "unresponsive attitude" mentioned in the Court's majority opinion based on its reference to Note 2, resulted from questions which took parts of conversations out of context and attempted

* Page references are to transcript of Record.

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to distort them for the Jury as the analysis thereof, hereafter stated, shows. The District Attorney and respondent sought a conviction and regarded the whole truth as an obstacle thereto, and petitioner therefore became an object of their anger and hostility.

(e) Petitioner believes that the full record clearly shows that the respondent was not a judge but an assistant to the District Attorney, intent on again being a prosecutor helping to convict not only the defendant but petitioner who had been named as a co-conspirator in the indictment. Petitioner was, therefore, himself on trial but without any rights (Pg. 92).

It is an open secret in New York that respondent is regularly assigned by the District Attorney to try all "sensitive" cases. It is respectfully submitted that the reason why only one Judge is capable of presiding over the important "public" trials, is obvious from his conduct of this case.

Appellant, a practitioner for 24 years, was quite conscious both of the limitations of his rights as a witness, despite his being "on trial", and the attitude of hostility of the Court towards him from the first trial during which a number of serious clashes occurred.

The affidavit in support of petitioner's motion referred to above, denied by respondent "in camera" specifically refers (pg. 128) to petitioner's differences with respondent during the first trial which petitioner hoped to avoid in the new trial by said motion and hoped also thereby to prevent a contempt situation. Contempt was the last thing petitioner wanted.

Respect for the Judicial process is as much a part of appellant's personality as his physical being; but petitioner cannot believe that the obligation and duty to obey the authority and rulings of a court require that, as a free citizen, he must stand by and permit himself to be brain-washed and repeatedly threatened without justification, and treated as if he were being interrogated in a Spanish Inquisition or Nazi torture chamber rather than in an open American courtroom.

From the opening colloquy above quoted, petitioner felt, and he believes the full record shows that every act by respondent toward him was designed to throw fear and terror into petitioner's heart and mind so that he should be concerned with the possibility of contempt (planned at the first trial), or possible perjury (exhibits 2, 3, 4 on pg. 46 and 52, are some examples). He never felt as a free and voluntary witness. Petitioner was from the very beginning placed in the conflicting emotional state between his desire to tell the truth on the one hand, and his desire to avoid being held in contempt or charged with perjury, on the other.

Thomas Jefferson said "I will resist any form of tyranny over the mind of man". Judicial tyranny can be one of the worst forms and it is respectfully submitted that this Court has repeatedly recognized the obligation to strike out against abuse of power, no matter where it occurs.

It is petitioner's basic and factual claimed position.

1. That the Judge was a tyrant and an assistant District Attorney, conducting a locked courtroom and that petitioner was the special object of the respondent's tyranny.

2. That petitioner was deliberately provoked repeatedly in an effort to create a contempt situation.

3. That the so-called contempt hearing, far from being an orderly or decorous proceeding was a sham and circus performance put on by the Court for the benefit of the press, radio and television who occupied the jury box; that the Judge not only had already convicted petitioner and had his speech written out, but petitioner knew the sentence in advance. The spectator referred to by Mr. Justice Black in his questioning on argument was a reporter going to file his story. Other items on this "hearing" will be reserved.

4. That the charges petitioner made against the Judge are true and the "apology", so designated by the Respondent and incorrectly referred to by petitioner's counsel on argument, was merely a statement to the effect that petitioner never intended or wanted to make the charges, but because of irresistible pressures created by the Judge, he involuntarily blurted out his inner convictions. Once made, petitioner in good conscience could not withdraw them.

If the entire record is examined in the perspective of these allegations and charges, it is respectfully hoped that the Court will reconsider its conclusions and opinion.

Even if the Court should read the record and not agree with petitioner's judgment, petitioner, at least, should have some forum in which these charges can be tried. Every effort to have them heard in New York has met with official silence or rejection. By this Court's affirmance of the contempt conviction the door seems to be closed on the opportunity to find out if the charges are true. On

the argument in this Court the question was asked, "what more could counsel on an adjournment have accomplished?" Could not a trial before another Court determine if petitioner's charges were true? By determining that a judge can hold a contempt proceeding before himself at any time, the Court will effectively prevent adjudication before an impartial tribunal of charges involving said judge. A person so charged would also invite a fresh contempt sentence if he were to repeat the charges.

There is even a broader principle involved. Participants in a trial will be barred from criticizing judges who may be guilty of wrongdoing, because the Judge can pose, as in this case, as an aggrieved party, and punish the accuser for contempt at anytime and there will be no remedy. Yet that is the effect of the Court's opinion. Petitioner feels that it was error for this Court to analyze the evidence, particularly when based only on respondent's restricted contempt citation, and make findings of fact in favor of the respondent without a full hearing before an impartial judge in which all the facts could be developed.

This Court recently established a new principle that it is not libelous for a newspaper to criticize any public official in the absence of deliberate malice. Why should not the same rule and standard, with limitations, of course, but thus insuring responsible conduct, be required of Judges? Petitioner appreciates the danger of abuse and a possible threat to the judicial process, but it is respectfully submitted that our democracy and judicial procedures may be strengthened if some members of the Judiciary knew that in the operation of their courtrooms they could not place themselves above the law. Petitioner recognizes and understandingly accepts the necessity for judi-

cial authority. He could not have actively practiced law for over a score of years without living by these principles. He also understands that instances do occur when a party, attorney or witness, may seek to intentionally provoke or otherwise tax the patience of a Court, but in the absence of a situation which clearly establishes that said conduct would cause "dissolution of a trial or demoralization of the Court's authority before the public", which certainly did not occur here, blind obedience to or acceptance of intolerable conduct by a judge without the right to criticize or challenge same will do violence to justice and freedom.

In negation of this Court's factual findings and observations, hereinabove referred to, petitioner briefly desires to analyze the excerpts quoted in Note 2, along with their surrounding facts, and further wishes to briefly refer to the circumstances of the "warning in Chambers" and the final incident of November 25th.

Firstly, petitioner did not have difficulties with the District Attorney from the outset of his testimony in the second trial, nor was he hostile. He testified for over an hour consuming over 40 pages of the trial record and answered all questions without incident.

The first excerpt from the contempt citation quoted in Note 2, which occurred thereafter, refers to the subject matter of conversations with Gale and Cymrot. Petitioner offered to give the conversations. The District Attorney, however, commenced a practice of asking a two part question, which assumed facts which were not true and which therefore could not be answered "yes" or "no", but part of which was "yes" and part "no". That this was so, was established by the Court's own questions (Page 3, Note 2)

which shows that petitioner spoke to these men, but not about the terms of the lease.

2. In the second quoted incident, the same thing occurred. The question asked by the District Attorney again was a two part question that assumed that petitioner had a conversation with defendant about the proposed lease. The record shows no such conversation ever took place. Petitioner's subsequent testimony showed that petitioner might probably have casually mentioned to Mr. Jack, in one of his innumerable conversations with him, that he was buying a property in which the City was a lessee, without any comment from defendant. Yet the "loaded" question, as asked, sought to create an impression that there was a conversation with defendant about the lease. It therefore could not be directly answered.

3. The next excerpt was part of the same subject matter. The District Attorney again sought to create the impression that petitioner had discussed this matter with Jack a half dozen times, rather than the fact that he had told the prosecutor about the said probable casual conversation a half dozen times. This was again the two part "loaded" question.

4. After the Court again berated petitioner for offering to explain figures which seemed to be confusing the District Attorney, petitioner was asked, two pages later by the prosecutor "Well, what happened to the \$150,000. You tell us in your own words". These were the very figures that the Court had just lectured petitioner about. However, again the Court's citation studiously ended the specification without showing the full picture, thus creating the aura of "volunteering or wrangling" referred to in the majority opinion of this Court.

It is respectfully submitted therefore, that the excerpts referred to in the Note 2 do not establish that petitioner attempted to rephrase questions or create problems. It is also most important to note that the respondent's citation studiously avoided inclusion therein, of three occasions when the judge without any basis and as part of his terror campaign and impatience warned petitioner he was contemptuous. Obviously, setting forth totally unwarranted threats of contempt would only prove respondent's hostility and attempts to badger petitioner.

Realizing that the contempt threat was present at all times petitioner leaned over backwards to comply with the instructions of the Court.

The background of the admonishment in Chambers is even more amazing.

A long double entendre statement involving not the defendant, but petitioner's alleged motive in making the loan to defendant was followed by the question "was it true"? Petitioner asked "was what true" trying to ascertain whether it was true that such statement was made to the grand jury by petitioner or whether the substance of the statement was true.

Petitioner's question to the District Attorney is printed incorrectly in this Court's record as "was *that* true?" (pg. 83). Immediately the Court jumped in said "no" * * * my dear man" excused the jury, ordered petitioner into the robing room, opened the Judiciary Law and began reading the statement appearing in note 7 on page 11 of this Court's opinion. It was so apparent to petitioner by that time that the campaign of terror was going to be the rule, that peti-

tioner asked respondent to cite him for contempt right then, but petitioner was abruptly dismissed (note 7).

Nor was there any special pattern of conduct by petitioner thereafter. A reading of the full record must satisfy this Court that respondent far from being patient and forbearing with petitioner, even conceding petitioner might have been a difficult witness, was irascible, threatening, harrassing, badgering, a hostile and biased judge and an assistant District Attorney on the bench.

Petitioner did not want to quarrel with or criticize respondent's rulings. He merely wanted to get through with his testimony and get out of the courtroom. He even consulted a doctor and a lawyer on Thanksgiving Day, the 24th, the day before the main incident occurred on the 25th, on how to accomplish this, because he felt it was respondent's intention to create an incident, if possible, to use as the basis of action against petitioner, which respondent finally did.

This was the background of the incident of the 25th. The immediate questions asked leading to the incident, far from being vital to the State's cause were fully and correctly answered before the alleged contempt outburst, but the Judge and prosecutor did not want the answers. The prosecutor knew from petitioner's testimony on the first trial which he had before him, as well as petitioner's grand jury testimony, that the questions asked had no answers other than that which he already had. They were deliberately "loaded" and misleading questions, because the prosecutor knew that the full conversation would not be helpful to the false picture he was seeking to create.

The record shows that two basic questions were involved. Taking a phrase out of a statement petitioner had made to

the defendant, the prosecutor asked (1) "Did you tell Jack there was a full scale Grand Jury investigation"? A. "I did". (2) Then the impossible question "... "when you told Mr. Jack there was now a full scale Grand Jury investigation, what did Mr. Jack tell you."? A. "He didn't respond to just one simple statement. It was part of a conversation and I can't distinguish one sentence from another in a half hour conversation the full details of which I don't recollect."

This was in essence what was said in the first trial and in the Grand Jury, as an examination of their records will reveal. Defendant had never made any comment about the Grand Jury investigation and the prosecutor knew it. Were not the answers full, responsive, direct, proper and honest answers? Should not the answers have sufficed? However, the Court jumped in immediately with, "Strike that all out."

The Court and the District Attorney were not content with the factual answer. The District Attorney wanted petitioner to give a false answer, and create the impression that the conversation was evil or conspiratorial by taking a phrase out of context from a statement petitioner had made to defendant, and seeking to get an answer that did not exist. The Court joined him as his assistant, intent on again being a prosecutor, and the explosion finally occurred.

The incident is clear proof and evidence that the charges of badgering and suppression were true. Respondent kept demanding an answer that did not exist, struck out a correct answer, and would not let the full conversation be testified to.

This was when petitioner's nerves began to give way and he repeatedly begged for a recess to contain himself.

Can this Court understand what it is like to feel chained to a chair? Petitioner felt as if his heart would explode inside of him and fought for control until the dam broke. Petitioner became violently ill and respondent knew it, which was why he refused to call a doctor although he twice consulted the District Attorney's staff as to what to do.

That scene was a defilement of everything American Justice stands for. Even if this Court may not believe all of these allegations or doubts petitioner's ability to prove them, should not he be permitted the opportunity to try to prove them? Would not the cause of Justice be better served by finding out what the truth is? Is not the cause of Justice injured by closing the door to an inquiry?

Appellant did not take this appeal seeking a technical legal victory. Petitioner's main motivation is a belief that fundamentals affecting the proper administration of justice and the freedom and liberty of the individual citizen are involved.

As to that sham contempt hearing, that was a planned travesty and mockery of justice. Why did respondent go through the show of serving papers, and then not giving a fair and full hearing, if he was objective? What harm would there have been to send the proceeding to another Judge if he had nothing to hide? What kind of a trial could petitioner have had before this judge on the face of this record? The Court's "evidence" on the hearing were the whole minutes of the first and second trial and some private letters. What parts thereof was petitioner to answer or defend himself against? How could he prepare for said

trial? Wasn't petitioner entitled to counsel of his own choice? How could he examine the Judge as a witness? How was due process served by the peremptory fashion in which petitioner was sent to jail without a stay or even one hour to produce the medical testimony? The proceeding was all part of the show for the press in the jury box. In the light of petitioner's charges, that proceeding disgraces judicial process. It is petitioner's hope that this feature of the case will also be explored and considered by the Court.

The denial of the application for an adjournment to both counsel and petitioner on the "hearing" was merely the final example of respondent's mental attitude toward petitioner. It is in the same vein, as his action on the motion, his contempt warning in Chambers, his impatience, his badgering and threatening, his not only calling petitioner a defendant but his treatment of petitioner worse than any defendant should ever be treated in a Court, his charge that petitioner was a malingerer, his deliberately misleading contempt citation and the sham hearing. His conduct was merciless, brutal, obsessive.

Petitioner respectfully requests the opportunity to personally appear and plead his cause, if the Court should consider a re-hearing. Petitioner would like the Court to form its own opinion and judgment of petitioner's personality and attitude toward Courts by a thorough and complete examination of him. Petitioner believes the Court will be satisfied that he does not indiscriminately challenge the authority of judges.

It is difficult for the Court to understand the depths of petitioner's feeling of outrage over the terrible injustice he sustained in being incarcerated by the Judge for the

Judge's own misconduct and never having been given an opportunity to prove his charges. Now, in addition, he may have to face disciplinary proceedings thereon.

It is respectfully submitted that to permit this judgment to stand, may satisfy judicial self preservation, but it sets back the cause of responsible conduct by Courts, is a severe blow to individual freedom, and gives some judges greater license to exercise judicial tyranny.

In *Hamilton v. Alabama*, 793, decided March 31, 1964, the Supreme Court decided that Miss Hamilton, a witness at a trial could not be held in contempt of court because during the course of the trial she took exception to her treatment by the District Attorney in not referring to her by her proper name. Although the case had racial overtones, nevertheless, it is a recognition by the Court that a witness had a right to talk up as to the manner in which she was treated.

A final note on two legal points.

(a) The Supreme Court decision in the main rested on the question whether or not there was embroilment between petitioner and the Judge. In the brief and on the oral argument it was contended, irrespective of embroilment, a Court should not sit in a contempt proceeding involving it after a trial is over.

(b) The Supreme Court did not treat the proceeding on the contempt that was charged and found in the record, but instead accumulated the alleged other incidents and treated them as if they were part of the contempt. In other words, if the utterance of November 25th was not being considered as the sole basis for contempt, the injection of the other incidents for the first time in the opinion, deprived petitioner of an opportunity to meet the issues in the appeal itself.

The conclusion of this Court that the respondent could rule on the question of contempt in an objective manner is based on an incomplete and insufficiently revealing portion of the record. Examination of the whole record, or at least the portions thereof mentioned in this application, would clearly indicate to the contrary. The failure to bring up for review such other parts of the record was inadvertent and due to unforeseeability of the rationale of the Court's decision. The Court was placed under a misapprehension by such omissions. A reconsideration by the Court with the supplemental record will in all probability lead to the conclusion that the respondent was himself so emotionally involved in the matter as to be incapable of unprejudicial and objective rulings. Such a conclusion would require rehearing below in accordance with applicable requirements of due process.

CONCLUSION

Therefore, it is respectfully submitted that a rehearing should be granted to consider all of the facts hereinabove stated.

Respectfully submitted,

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Petitioner, pro se
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Certification

The foregoing Petition For a Re-Hearing is believed to be meritorious and is presented in good faith and not for delay.

Dated: April 14th, 1964.

SIDNEY J. UNGAR
Petitioner, pro se
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New York 13, N.Y.

